TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 31.

EL PASO AND SOUTHWESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

E. D. VIZARD.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED FEBRUARY 27, 1903.

(20,691.)

(20,591.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 245.

EL PASO AND SOUTHWESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

H. D. VIZARD.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 1589.

EL PASO & SOUTHWESTERN RAILROAD CO., Plaintiff in Error,
versus
H. D. VIZARD, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Texas.

[Original Record Filed July 20, 1906.]

U. S. Circuit Court of Appeals, Filed Aug. 30 1906.
CHARLES H. LEDNUM, *Clerk.*

b UNITED STATES OF AMERICA, *Fifth Judicial Circuit:*

Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, 1906, at Fort Worth, Texas, and on the third Monday in November, 1906, at New Orleans, Louisiana, before the Honorable Don A. Pardee, the Honorable A. P. McCormick and the Honorable David D. Shelby, Circuit Judges.

No. 1589.

EL PASO & SOUTHWESTERN RAILWAY CO., Plaintiff in Error,
versus
H. D. VIZARD, Defendant in Error.

Be it remembered, That heretofore, to-wit: on the 20th day of July, 1906, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Western District of Texas, was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figures following, to-wit:

1 *Caption.*

Transcript.

In the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error,
versus
H. D. VIZARD, Defendant in Error.

Be it remembered, That there was opened and begun to be holden a regular term of the United States Circuit Court of the Fifth Circuit

and Western District of Texas, at El Paso, on the 2nd day of April, A. D. 1906, it being the first Monday in said month, and the day fixed by law for commencing a regular term of said Court at said place (ending on April 14th, 1906).

Present:

The Honorable T. S. Maxey, United States District Judge;
Hon. Henry Terrell, United States Attorney;
Eugene Nolte, United States Marshal for said District, and
D. H. Hart, Clerk of said Court;

When and where the following proceedings, among others, were had, to-wit:

No. 424.

H. D. VIZARD, Plaintiff,
vs.
EL PASO & SOUTHWESTERN RAILROAD COMPANY, Defendant.

2 *Transcript of Record from District Court of El Paso County, Texas.*

Filed March 20th, A. D. 1906.

* * * * * * *

THE STATE OF TEXAS, *County of El Paso:*

At a term of the District Court, begun and holden at El Paso, within and for the County of El Paso, before the Honorable J. M. Goggin, Judge, Presiding:

Beginning on the first day of January, A. D. 1906, the following proceedings were had.

No. 5187.

H. D. VIZARD, Plaintiff,
vs.
EL PASO & SOUTHWESTERN RAILWAY COMPANY, Defendant.

Citation.

The State of Texas to the Sheriff or any Constable of El Paso County, Greeting:

You are hereby commanded to summon the El Paso & Southwestern Railway Company, a corporation doing business and having an office and local agent in the City and County of El Paso, Texas, to be and appear before the Honorable District Court of El Paso County, Texas, 41 Judicial District, at the next regular term thereof, to be holden at the Court House in the City of El Paso, on the first Monday in May, A. D. 1904, then and there to answer the Plaintiff's Petition filed in a suit in said Court on the 18th day of April A. D. 1904,

wherein H. D. Vizard, plaintiff, and The El Paso and Southwestern Railway Company is defendant—File Number of said suit being No. —.

The nature of plaintiff's demand is as follows, to-wit:

Suit for the sum of $25,000.00 for personal injuries, and alleging that on and prior to the 22nd Feb'y, 1904 he was employed by the defendant as brakeman, and on said day his train was ordered by defendant to pick up a car at Osborn, Ariz. That plaintiff attempted to reach said car by means of hand rail maintained thereon for this purpose when said hand rail, on account of the fact that same was old, worn out and had no nut on the end of same, it suddenly pulled loose and plaintiff was thrown and fell from said car, and in his fall was cruelly and severely injured in the back, spine and legs and rendered a cripple for life without any fault of negligence on his part.

And you will deliver to said defendant, by delivering to Geo. C. Meyser, its local Agent in El Paso, Texas, in person a true copy of this Citation.

Herein fail not and have you before said Court this writ, with your endorsement thereon, showing how you have executed the same.

Given under my hand and the seal of said Court, at Office in El Paso, Texas, this the 18 day of April A. D. 1904.

Attest:

[SEAL.] I. ALDERETE,
Clerk District Court, El Paso Co., Texas,
By A. J. JEFFREY, *Deputy.*

Sheriff's Return.

Came to hand on the 18th day of April A. D. 1904, at 5 o'clock P. M., and executed on the 19th day of April A. D. 1904 by delivering to G. C. Meyser, Local Agent for the within named defendant, in person, a true copy of this writ.

J. H. BOONE,
Sheriff of El Paso Co., Texas,
By M. CLEMENTS, *Deputy.*

(Endorsed:) File No. 5187. District Court, El Paso County, Texas, May Term, 1904. H. D. Vizard *vs.* El Paso & Southwestern R'y Co., Citation Issued April 18, 1904. I. Alderete, District Clerk, By A. J. Jeffrey, Deputy. Filed the 27th day of April, 1904. I. Alderete, Clerk, By E. B. McClintock, Deputy.

Plaintiff's Original Petition.

In the District Court, Forty-first Judicial District of El Paso County, Texas, May Term, 1904.

No. 5187.

H. D. VIZARD
vs.
EL PASO & SOUTHWESTERN RAILWAY COMPANY.

STATE OF TEXAS, *County of El Paso:*

To the Honorable J. M. Goggins, Judge:

Come now your petitioner, H. D. Vizard, (page 5) hereinafter *styled* plaintiff, complaining of the El Paso and Southwestern Railway Company, hereinafter styled defendant, and respectfully represents and shows to the Court:

That the plaintiff is a resident of the City and County of El Paso and State of Texas; that the defendant is a corporation duly and legally incorporated, and is now and was on the dates hereinafter mentioned, engaged in the business of owning and operating a line of railroad extending into the City and County of El Paso and State of Texas, where it has and maintains an office and local agent; that Geo. C. Meyser is defendant's local agent in El Paso County, Texas; that heretofore, to-wit, on and prior to the 22nd day of February, 1904, as well as at the present time, said defendant company owned and operated a line of railway extending from Naco, in the
3 Republic of Mexico, westerly through the Territories of Arizona and New Mexico, to and into the City and County of El Paso and State of Texas, and on said 22nd day of February, 1904, was engaged in operating upon and over said railroad, a large number of engines, trains and cars which were in fact owned by defendant, as well as other cars by other railroad companies, and employed a large number of engineers, conductors, firemen, car repairers and other employés, whose business it was to run and operate its trains, repair its cars and do other duties in the usual course of business conducted by said defendant company; that at said time said defendant company maintained a large number of switches and side tracks on the aforesaid line of railway, one of which was known as Osborne, Arizona, at which place cars were stored and picked up and placed in the trains; that heretofore, to-wit, on or about the 22nd day of February, 1904, as well as prior thereto plaintiff was employed by said defendant company as a brakeman on a freight train between Douglas and Naco; that on or about said 22nd day of February, 1904, said defendant company and its duly authorized (page 6) agents had ordered and directed plaintiff and the other employés to stop their train at said station of Osborn, and pick up and place in their said train certain other cars, one of which was known as and called a water car; that said water car which was ordered and directed to be picked up at said

station, consisted of a flat car with a water tank maintained thereon; that said defendant company had also built, constructed and maintained on the sides of said flat car, hand holds or hand rails which said hand holds or hand rails were constructed by means of the use of a long round piece of iron, which extended through holes in upright standards or posts maintained to said car; that at each end of said car, said hand hold was maintained in the standard by means of running the ends of said hand holds through the standard and by screwing the nut or bolt on the end of said hand hold or hand rail in order to prevent said hand rail from pulling out of said standard; that said hand hold or hand rail was constructed and maintained on said car by said defendant company for the use of its brakemen and other employés to hold on to when it became necessary for said brakeman or other employé to climb on to said car from the side, either while said car was standing still or in motion.

And the plaintiff avers and charges that when his train arrived at said station of Osborne, in obedience to the orders and commands of said defendant company, the engine was cut off and backed in
4 on the side track and was coupled on to said flat car and other cars standing on the side track at this place; that after the coupling was properly made, the order was given to said engineer to pull out on the main line, and that at or about the time the engine started out with said cars plaintiff, while acting under the orders and directions of said defendant company, its servants, agents and employés, started to climb on said water car in order to ride it out, as (page 7) it was his duty to do, under his employment, and that in order to get aboard said water car, it became necessary for him to take hold of said hand rail or hand hold, as above mentioned, and pull himself upon the car, and plaintiff says that while said train was moving at a very slow rate of speed he caught hold of the aforesaid hand rail or hand hold and started to pull himself up on the car, when the end of said hand rail pulled loose from the standard and he was thrown and fell, and in his fall he struck with great force and violence on the end of some railroad ties and other obstructions and was greatly, seriously and permanently injured as hereinafter set out.

Plaintiff further avers that the nut, which was intended to be used and which was necessary to fasten the end of said hand rail in said upright standard in order to hold said hand rail from pulling loose when same was used by the brakemen, had been removed or had fallen off at the time plaintiff took hold of same, and by reason of the fact that said hand hold had no nut thereon, it suddenly pulled loose and gave way, and he was thrown and fell from said car and injured as aforesaid.

Plaintiff avers and charges that it was the duty of said defendant company, its servants, gents and employés, to furnish for his use, as well as the use of all other employés, a reasonably safe and suitable car, hand holds and appliances thereto attached, in a reasonable safe and sound condition, and to test, inspect and keep in repair said car and appliances, or cause same to be tested, inspected and repaired, and kept in a reasonably safe condition; but plaintiff avers and

charges that said defendant company, its servants, agents and employés, disregarding the rights and duties they owed to this plaintiff, as well as to all other employés who might be called on to use said car, negligently and carelessly failed, neglected and refused to provide said car with resonably safe and suitable hand rails and to test, inspect and keep same (8) in repair, but acting as aforesaid, negligently and carelessly placed the aforesaid car with the defective hand rail thereon on the side track and ordered and directed plaintiff and the other employés to pick said car up and place same in plaintiff's train, well knowing at said time that on account of the fact that the hand hold had no nut on the end, that said hand rail was unsafe and dangerous, and would pull loose and throw plaintiff, or cause plaintiff or some other employés to fall from said car when they attempted to mount the car or dismount therefrom by the use of said hand rail, and plaintiff says that by reason of the aforesaid negligence and carelessness of said defendant company and while he was in the exercise of due care for his own safety, he was thrown from said car and seriously and permanently injured.

Plaintiff avers and charges that the nut on said hand rail had been removed or fallen off long prior to the time plaintiff was injured, and he further alleges that on account of the fact that the end of said hand rail and the threads on which said nut was maintained had become old, worn out and rusty, that it was impossible to keep the nut on the end of said hand rail, for the reason that the threads were eaten up with rust and were worn and defective and the ordinary jolt of the train would cause said nut to fall off; that said defendant company, its servants, agents and employés, knew that the threads on the end of said hand rail were rusty and badly worn and was in such a defective condition that the nut would not stay on the end; that when said nut was removed or had fallen off, said hand rail was unsafe and dangerous, and knew that when the plaintiff or some other employés attempted to use said car and hand rail thereon, that same would pull out of the hole in said standard and said employé would be thrown from the car and killed or seriously injured, or could have known of the above facts, as well as the defects in said hand rail, by the exercise of ordinary care, caution and inspection; but plaintiff says that he was ignorant of (page No. 9) the defective and unsafe condition of said hand rail until too late to avoid said accident, and his consequent injuries.

Plaintiff avers and charges that said defendant company, its servants, agents and employés, were guilty of gross negligence in allowing said car to leave Douglas, or some other place where they had their car inspectors and car repairers, without first inspecting said car and discovering the defect in said hand rail and remedying same by either placing on the end of said hand rail a good and sufficient nut, or by removing said old, defective hand rail and placing thereon a new and reasonably safe hand hold or hand rail with a good and sufficient nut on the end of said hand rail in order to hold same thereon, and in said standard, and plaintiff says that the aforesaid negligent and careless acts and omissions on the part of

said defendant company, and its duly authorized agents, was
6 the direct and proximate cause of this accident, for which the defendant company is liable.

Plaintiff says that at the time of said accident he was acting in the line of his duties and in the scope of his employment as brakeman, and was obeying the orders of said defendant company and the conductor in charge of said train, and that if said hand hold or hand rail had been in a reasonably safe condition and had been properly fastened and maintained on said car and in and to said standard, or had had a nut on the end of same, the same would not and could not have pulled loose and given way, and thrown plaintiff from said car.

Plaintiff avers and charges that when said hand rail or hand hold pulled loose and gave way, he was thrown and fell with great force and violence and struck his back and spine on the end of some ties and cribbing, which was built near the tracks at this place, on which was situated a water tank; that on account of the fact of striking the ends of some ties, he was thrown and fell to the ground, and by reason of said fall, together with striking his back on the sharp end (page 10) of some railroad ties and on the ground and other hard substances, he was greatly, seriously and permanently injured in his back, spine, legs, head and internal organs, and rendered a cripple for life; that by reason of the aforesaid injuries he is now confined to his bed, unable to walk, and he has reason to believe, and does believe, and here alleges, that said injuries are permanent; that on account of the aforesaid injuries he has suffered and will continue to suffer during the remainder of his life great bodily pain and mental anguish; has paid out and incurred large sums of money for medicine and medical attention, which sums were reasonable and necessary, and that his ability to earn a living, on account of the aforesaid injuries, has been greatly impaired and will so continue impaired during the remainder of his life; that as a result of said injuries he has become incapacitated from following his business of railroading, in which he is skilled, and on account of the fact that he has no other profession, he is unable to follow his usual business of railroading, he has suffered a great pecuniary loss; that at the time of said accident plaintiff was earning the sum of $100.00 per month, which earning capacity would have increased with his experience in years; that he is twenty-eight (28) years of age, and prior to said accident was a strong and healthy man, and plaintiff says that by reason of the aforesaid premises and all the facts, he has been damaged in the total sum of twenty-five thousand dollars ($25,000.00.)

Wherefore, plaintiff prays that said defendant be cited to
7 answer this petition, and that on final hearing he have judgment for his said damages and cost of suit.

PATTERSON & WALLACE,
Attorneys for Plaintiff.

(Indorsed:) 5187. H. D. Vizard *vs.* The El Paso & Southwestern Railway Company. Plaintiff's original petition. Filed this 18th day of April, A. D. 1904. I. Alderete, Clerk District Court, El Paso Co., Texas, by A. J. Jeffrey, Deputy. (Page 11.)

Contract and Agreement Between H. D. Vizard and Patterson & Wallace.

STATE OF TEXAS, *County of El Paso:*

This contract and agreement, made and entered into at El Paso, Texas, this 21st day of April, 1904, by and between H. D. Vizard, party of the first part, and Patterson & Wallace, parties of the second part;

Witnesseth, That whereas, on the 18th day of April, 1904, party of the first part filed and caused to be filed in the District Court of El Paso County, Texas, a certain suit and cause of action, styled "H. D. Vizard *vs.* The El Paso and Southwestern Railway Company," said suit being a suit for the sum of twenty-five thousand ($25,000.00) dollars;

And, whereas, the party of the first part has employed the parties of the second part to file said suit and prosecute same through all the Courts to which it may be taken, for and in consideration of an undivided one-third (⅓) interest in said suit and cause of action.

Therefore, know all men by these presents, that I, H. D. Vizard, for and in consideration of the said Patterson & Wallace appearing as my attorneys and representing me in the aforesaid suit and cause of action, do by these presents hereby transfer, sell and assign unto the said Chas. B. Patterson and Geo. E. Wallace, or their assigns, an undivided one-third interest in said suit and cause of action.

And I hereby authorize and empower my said attorneys to appear in said suit and cause of action for me and in my behalf and to prosecute same through all the Courts to which it may be taken to a final termination.

Hereby ratifying and confirming any and all acts and deeds of my said attorneys done in the premises hereof.

8 Witness our hands in duplicate this the 21 day of April, 1904.

H. D. VIZARD.
CHAS. B. PATTERSON.
GEO. E. WALLACE.

THE STATE OF TEXAS, *County of El Paso:*

Before me, C. W. Marshall, a notary public in and for El Paso County, Texas, on this day personally appeared H. D. Vizard and Chas. B. Patterson and Geo. E. Wallace, each known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 21st day of Apr., 1904.

C. W. MARSHALL,
[SEAL.] *Notary Public, El Paso County, Texas.*

(Indorsed:) No. 5187. H. D. Vizard *vs.* El Paso & Southwestern Ry. Co. Contract and Ass'g'm't. Filed this 21st day of April, A. D. 1904. I. Alderete, Clerk District Court, El Paso Co., Texas. E. B. McClintock, Deputy.

Original Answer of Defendant.

In Dist. Ct., El Paso Co., Tex. (41st Jud. Dist.).

No. 5187.

H. D. VIZARD
vs.
EL PASO & SOUTHWESTERN R. R. Co.

(Page 13.) Now comes the defendant in the above styled cause and answering denies all that is alleged by the plaintiff in his petition.

Wherefore, &c.

PATTERSON & BUCKLER,
Att'ys for Def't.

(Indorsed:) No. 5187. In Dist. Ct., El Paso Co., Texas. (41st Dist.) H. D. Vizard *vs.* El Paso & S. W. Ry. Co. Answer of Def't. Filed this 25th day of April, A. D. 1904. I. Alderete, Clerk District Court, El Paso Co., Texas. E. B. McClintock, Deputy.

9 *Plaintiff's Trial Amendment.*

In the District Court of El Paso Co., Texas, 41st Judicial District, Sept. Term, 1904.

No. 5187.

H. D. VIZARD
vs.
EL PASO & SOUTHWESTERN RAILWAY COMPANY.

To the Honorable Judge of Said Court:

Now comes plaintiff, H. D. Vizard, hereinafter styled plaintiff, complaining of the El Paso & Southwestern Railway Company, hereinafter styled defendant, and, after leave of the Court first had and obtained, files this his trial amendment in addition to the allegations set up by plaintiff in the original petition filed in this cause, and for amendment says:

That when said hand rail or hand hold pulled loose and gave way, he was thrown and fell with great force and violence and struck his back and spine on the end of some ties, or cribbing built and maintained by defendant near the track, at the place where said accident occurred; that when he fell and was thrown from said car, and after his back and spine had come in contact with the aforesaid ties or cribbing, he then was thrown and fell to the ground, and by reason of his fall and great weight, together with striking his back and spine (page 14) on the ends of said ties or cribbing and other hard sub-

stances, as he fell to the ground, he was seriously and permanently cut, bruised and wounded both internally and externally, in and on his back, spine legs, hips and head; that also in said fall and by reason of the bruises, injuries and wounds received on his back, spine and legs, his kidneys and bladder, together with the nerves and muscles by which the same are controlled, was seriously and permanently injured and affected, a more specific allegation of his injuries to his back, spine, legs, head, hips, kidneys and bladder plaintiff is now unable to specify, other than that by reason of said injuries received at said time he is now a cripple for life; that on account of said injuries, and more especially the injuries to his back, spine, legs, bladder, hips and kidneys, he is now confined to his bed, unable to walk without assistance; that he has reason to believe, and does believe, and here alleges, that the aforesaid injuries to his back, spine, legs, hips, kidneys and bladder are serious and permanent and will continue serious and permanent the remainder of his life; that on account of the injuries above mentioned, he has suffered, and
10 will continue to suffer during the remainder of his life, great bodily pain and mental anguish, and has paid out and incurred, and will be compelled to pay out and incur in the future, large sums of money for medicine, medical attention and nurse hire, which said sums heretofore paid out and incurred and hereafter necessarily to be paid out and incurred are reasonable and necessary; that on account of each of the aforesaid injuries, together with the fact that his health is now greatly impaired by reason of said injuries, and the fact that he is a cripple unable to walk, his ability to earn a living, on account of the aforesaid injuries, has been greatly impaired, and will so continue impaired during the remainder of his life; that at the time of said accident he was a strong, (page 15) healthy and robust man, skilled in his business of railroading, and at said time he was earning the sum of one hundred ($100.00) dollars per month, and that his earning capacity, if he had not been injured, would have increased with his experience in years; but that on account of said injuries and accident he is now wholly incapacitated from following his business of railroading, or any other business or calling which would require any sort of manual labor, and for this reason he has suffered great pecuniary loss; that he is now twenty-eight (28) years of age and a cripple for life, and plaintiff says that by reason of the negligence and carelessness of said defendant company, as the same is set out in his original petition filed in this cause, and by reason of the aforesaid injuries and his now crippled condition growing out of the negligence of said defendant company, he has been damaged in the total sum of twenty-five thousand ($25,000.00) dollars.

Wherefore, all parties being before this Court, plaintiff prays that on final hearing he have judgment for his aforesaid damages and cost of suit, and for such other and further relief as he may show himself entitled to in law or under the facts, for which he will ever pray.

PATTERSON & WALLACE,
Attorneys for Plaintiff.

(Indorsed:) H. D. Vizard, No. 5187, *vs.* El Paso & Southwestern Railway Company. Plaintiff's trial amendment. Filed this 1st day of Oct., A. D. 1904. I. Alderete, Clerk District Court, El Paso Co., Texas. A. V. Gonzales, Deputy.

11 *Defendant's First Amended Original Answer.*

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 5187.

H. D. Vizard
vs.
El Paso & Southwestern Railway Company.

Now comes the defendant in the above (page 16) styled cause, and by leave of the Court files this its first amended original answer, in lieu of its original answer heretofore filed in this cause on April 24th, 1904.

(1) And excepting specially to the petition of plaintiff filed herein on April 18th, 1904, this defendant says: That said petition is insufficient in so far as it alleges that the hand rail was in a defective condition, or alleged to be in a defective condition, through the failure of any of the agents, representatives or employés of the defendant to perform any duty, in this: Said petition does not allege what agent or employé or representative of the defendant had any duty to perform which was not performed, and does not allege what the duty was which was to be performed and which was not performed, and does not inform the defendant with any degree of particularity as to what agent, employé or representative of the defendant was guilty of a violation of any duty, and does not allege with any particularity what duty was violated.

And defendants except specially to the original petition of the plaintiff filed herein on April 18th, 1904, for the following reasons:

(2nd) That said petition does not allege, and is insufficient in that it does not allege, in what respect the plaintiff was injured in his back on account of or by reason of the accident mentioned in his petition, and does not allege what part of his back was injured, or where he was injured in the back, and does not allege the nature of the injuries received by him in the back.

(3rd) And defendant excepts to said petition in so far as it alleges that the plaintiff was injured in his spine, for the reason that said petition does not set forth how the plaintiff was injured
12 in the spine, or the nature of the injuries that were received by him in the spine, or in what part of his spine the injuries alleged to have been received by him were received, and (page 17) does not set forth with any particularity any injury received by him in his spine.

(4th) And defendant excepts to said petition in so far as it alleges that the plaintiff was injured in his legs, for the reason that said peti-

tion does not set forth with any particularity how the plaintiff was injured in his legs, or what part of his legs was injured, and does not set forth in any way the nature of the injuries received by the plaintiff in his legs.

(5th) And said petition is insufficient in so far as it alleges that plaintiff was injured in his head, as the same does not set forth how the plaintiff was injured in his head, or what part of his head which was injured, or in any respect the nature of the injuries which were received by him in his head.

(6th) And the defendant excepts to said petition in so far as it alleges that the plaintiff was injured in his internal organs, for the reason that it does not set forth how the plaintiff was injured in his internal organs, and does not allege which of the internal organs of the plaintiff was injured, and does not set forth in any way the nature of any injury received by the plaintiff in his internal organs.

(7th) And defendant excepts to said petition in so far as it alleges that the plaintiff was, by the accident mentioned in his petition, rendered a cripple for life, for the reason that said petition does not set forth how the plaintiff was rendered a cripple for life, or in what respect he was made a cripple for life, and does not set forth with any particularity the nature of the injuries which have rendered him a cripple for life.

(8th) Defendant excepts to said petition in so far as it alleges that plaintiff has suffered great bodily pain, for the reason that said petition does not set forth what bodily pain the plaintiff has suffered, or in what part of his body said pains have been experienced, or in what part of his body he has experienced bodily pain since the accident mentioned in his petition (page18) happened, and does not set forth where the bodily pains complained of by him are located, and does not describe the bodily pain mentioned in said petition with any degree of particularity whatever.

13 And the defendant further answering says, that it denies all and singular the allegations in plaintiff's petition contained, and of this it puts itself upon the country.

Wherefore, etc.

PATTERSON & BUCKLER,
Attorneys for Defendant.

And answering further, said defendant says that by article "2767" of the Revised Statutes of Arizona, which was in force at the time of the accident mentioned in plaintiff's petition, it is provided as follows:

"Every corporation doing business in the Territory of Arizona shall be liable for all damages done to any employé in consequence of any negligence of its agents or employés, to any person sustaining such damages, provided said corporation has had previous notice of the incompetency, carelessness or negligence of such agent or employé."

And defendant says that what is known as the "common law" obtains generally in the Territory of Arizona, and did obtain and was in force at the time of the accident mentioned in plaintiff's petition,

excepting in so far as the common law might be modified by statute, and it says that by the statute above mentioned, as construed in the Territory of Arizona, and as it should be construed by this Court and all other Courts, all of the inspectors mentioned in the plaintiff's petition were the fellow servants of the plaintiff H. D. Vizard, and if the accident mentioned in plaintiff's petition happened through the negligence of any inspector or any employé of defendant, whatever position he may have occupied with respect to the defendant's business at the time of said accident, said employé was a fellow servant of the plaintiff. And the defendant says that if said (page 19) accident happened through the incompetency, carelessness or negligence of any of its agents or employés, it had no notice whatever of such incompetency, carelessness or negligence prior to said accident.

And answering further, this defendant says, that even without regard to the statute above mentioned (Article # 2767), all of the employés of the defendant connected with its business in the territory of Arizona, mentioned in the plaintiff's petition, were the fellow servants of the plaintiff, and if he was injured, as alleged in his petition, through the negligence or carelessness of any person whomsoever, such person was the fellow servant of the plaintiff.

And answering further, this defendant says that if plaintiff was injured on account of the accident mentioned in his petition, he was injured in consequence of and as a result of a risk as-
14 sumed by him in the discharge of his duties as the employé of the defendant.

And defendant further says that if the plaintiff was injured in consequence of the accident mentioned in his petition, he was injured through his own negligence, or in consequence of his own contributory negligence, and that defendant is not liable to him, as alleged in his petition.

PATTERSON & BUCKLER,
Att'ys for Def't.

(Indorsed:) No. 5187. In Dist. Court, El Paso Co., Tex., 41st Dist. H. D. Vizard *vs.* E. P. & S. W. R. R. Co. Def't's first amended original answer. Filed this 31st day of Oct., A. D. 1904. I. Alderete, Clerk District Court, El Paso Co., Texas. A. V. Gonzales, Deputy.

(Page 20.)

Motion to Quash Deposition of R. A. Eubanks.

In the District Court, El Paso County, Texas, 41st Judicial District.

No. 5187.

H. D. VIZARD
vs.
E. P. & S. W. RY. CO.

Now comes the defendant in the above styled cause and asks the Court to quash and strike out the deposition of R. A. Eubank, which is among the papers in this cause, and which is indorsed as having been received by the clerk of this Court, on May 3rd, 1904, from the hands of Joseph H. McBroo, for the following reasons, to-wit:

First. It does not appear that said deposition was returned by mail, and there is no affidavit on file such as required by article 2286 of the Revised Statutes of Texas.

Second. The certificate of the clerk of this Court which is attached to the copy of interrogatories, upon which the deposition is taken, in that it does not refer to any copy of any notice to take the deposition of said R. A. Eubank, and there is no indorsement or statement in said certificate as to when the interrogatories, to which the certificate is attached, were filed.

15 Third. The commission which is attached to and returned with the deposition of R. A. Eubank, was issued without any return showing service of the notice to take said deposition, and a copy of the interrogatories upon the defendant, as required by law. The only thing on file purporting to show any service whatever on defendant respecting said deposition being a return upon a precept to serve interrogatories, issued by the clerk of this Court on April 18th, 1904. Said precept to serve interrogatories to take the deposition of R. A. Eubank is insufficient for the following reason: Said precept does not state when the interrogatories for the deposition of R. A. Eubank were filed, and there is nothing either in said precept or in the certificate of the clerk attached to said interrogatories show-

(page 21) -ing when the interrogatories were filed.

Fourth. The officer's return on said precept to serve interrogatories is insufficient and was insufficient to authorize the issuance of a commission which was issued by the clerk on April 29th, 1904. Said return was and is insufficient in this: It does not show that a certified copy of said interrogatories was delivered to any one in person, and it does not show that a certified copy of the notice to take deposition of R. A. Eubank was delivered to any one in person by the officer who made said return.

PATTERSON & BUCKLER,
Att'ys for Def't.

(Indorsed:) 5187. In Dist. Ct., El Paso Co., Tex. H. D. Vizard *vs.* E. P. & S. W. R. R. Co. Motion to Quash deposition of R. A. Eubank. Filed this 31 day of Oct., A. D. 1904. I. Alderete, Clerk District Court, El Paso Co., Texas. A. V. Gonzales, Deputy.

Plaintiff's First Amended Original Petition.

In the District Court of El Paso County, Texas, 41st Judicial District, January Term, A. D. 1906.

No. 5187.

H. D. VIZARD, Plaintiff,
vs.
EL PASO & SOUTHWESTERN RY. CO., Defendant.

To the Hon. Judge of said Court:

Your petitioner, H. D. Vizard, hereinafter styled plaintiff, complaining of the El Paso & Southwestern Ry. Co., hereinafter
16 styled defendant, after leave of Court first had and obtained, files this his first amended original petition and for amendment and for cause of action respectfully (page 22) represents and shows to the Court:

That plaintiff resides in El Paso, Texas; that defendant is a corporation duly and legally incorporated, and is now and was on the dates hereinafter mentioned a common carrier of freight and passenger for hire, and owned and operated a line of railway extending from Naco, in the Republic of Mexico, westerly through the territories of Arizona and New Mexico, and to and into the City and County of El Paso and State of Texas, where it has and maintains an office and local agent; that on and prior to the 22nd day of February, 1904, defendant was engaged in operating upon and over the aforesaid line of railway a large number of engines, trains and cars, which were in fact owned by said defendant, as well as other cars owned by other railroad companies, and employed a large number of engineers, conductors, brakemen and other employés whose business it was to run and operate its trains, inspect and repair its cars, in the usual course of business conducted by said defendant company; that at said time defendant also maintained a large number of stations, switches and side tracks on its aforesaid line of railway, one of which was known as Osborne, Arizona, at which place cars were sidetracked, switched, stored, picked up and placed into trains; that heretofore, on or about the 22nd day of February, 1904, and prior thereto, plaintiff was employed by said defendant as a freight brakeman, running between Douglas and Naco, under the orders, directions and supervision of said defendant company, its servants, agents and employés; that on or prior to said 22nd day of February, 1904, said defendant company had set out at said station of Osborne a certain car, known as a water car; that said water car consisted of a flat car with a water tank maintained thereon, and

said car also had maintained thereon a hand hold or hand rail which was constructed by means of the use of a round piece of iron through holes in upright standards, or posts maintained to said car; that at (page 23) each end of said car said hand rail or hand hold was maintained in the standards by means of running the end of said piece of iron through the standard, and screwing a nut or bolt on the end of said hand hold or hand rail in order to prevent same from pulling out when in use; that said hand rail was constructed and maintained on said car by said defendant company for the use of its brakemen and other employés to hold or swing on to when it became necessary for brakemen and other employés to climb
17 on to the side of said car and hang thereon, either while said car was standing still or in motion.

Plaintiff avers and charges that when said train arrived at said station of Osborne, in obedience to orders received from said defendant company, the engine was cut off and backed in on the side track and a coupling was made to the aforesaid flat car and other cars standing thereon; that after the coupling was properly made the engineer was signaled to pull out on the main line; that at or about the time the engine started to move out of said track with said cars that in order to follow said cars plaintiff started to climb on to said water car as it was his duty to do under his employment, and that in order to get aboard said car or get in a proper position to ride said cars out, he took hold of said hand rail above mentioned, and at or about the time he caught hold of said hand rail, and while the train was moving very slowly, the end of said hand rail pulled loose from the standard and suddenly bent with his weight and he was thrown and fell, and struck with great force and violence on the end of some railroad ties or other obstructions, and in said fall was greatly, seriously and permanently injured, as hereinafter set out.

Plaintiff avers and charges that the nut which was necessary to be used on the end of said hand rail to fasten said hand rail securely in said upright standard, and prevent said hand rail from pulling loose when same was used by the employés, had been removed or had fallen off at the time (page 24) plaintiff took hold of same, and by reason of the fact that said hand rail had no nut thereon, it suddenly pulled loose with his weight, causing said hand rail to give way, and he was thrown and fell from said car, and was injured as aforesaid.

That in addition to the aforesaid grounds of negligence, plaintiff says that said defendant company was guilty of negligence in the following respects: That said car did not have the usual, customary and necessary hand holds and grab irons maintained thereon; that in addition to said hand rail above mentioned, in order to properly equip said car, it was the duty of said defendant company to have maintained on the standards of said car, through which said hand rail was run, reasonably safe and sufficient hand holds to be used by employés in climbing on the said car, and also reasonably safe, suitable and sufficient grab irons maintained on the end of said car as provided by the Statutes of the United States; that said defendant company at said time had failed, neglected and refused to have main-

tained on said car any hand holds, or grab irons on the standards, or any grab irons on the end of said car.

18 Plaintiff further avers and charges that it was the duty of said defendant company, its servants, agents and employés to furnish for his use, as well as for the use of other employés, a reasonably safe and suitable car, properly equipped with reasonably safe and suitable hand holds, hand rails, grab irons and other appliances thereon attached, in a reasonably safe and sound condition, and to test, inspect and repair said car and applicances thereon, or cause same to be tested, inspected and repaired, and kept in a reasonably safe condition, but plaintiff avers and charges that said defendant company, disregarding the rights and duties it owed to this plaintiff, as well as to other employés who might be called upon to use said car, negligently and carelessly failed and refused to provide said car with reasonably safe and suitable hand rails and grab irons, and to test, inspect and repair (page 25) same, or to keep same in repair, and in a reasonably safe condition, but, acting as aforesaid, negligently and carelessly placed the aforesaid car with said defective hand rail thereon, on the side track, and without any grab irons or hand holds on the standards on the end of said car, and ordered and directed plaintiff and other employés to pick up said car, switch same and place said car in plaintiff's train, well knowing at said time that on account of the fact that said hand hold or hand rail had no nut on the end, that said hand rail was unsafe and dangerous, and would pull loose and throw plaintiff or cause plaintiff or some other employé to fall from said car, when he attempted to mount said car, or dismount therefrom by the use of said hand rail; and plaintiff says, by reason of the aforesaid facts and negligence and negligent acts and omissions on the part of said defendant company, while he was in the exercise of due care for his own safety, he was thrown and fell from said car and seriously injured.

Plaintiff further avers and charges that he has good reason to believe, and does believe, and here alleges, that the nut on said hand rail had been by said defendant company removed or allowed to fall off long prior to the time plaintiff was injured, and that said car, which was used in interstate shipment, was not properly equipped with all the safety appliances and grab irons as provided by the Statutes of the United States; that on account of the fact that the end of said hand rail was old, worn and rusty, and the threads thereon in a defective, worn and rusty condition, it was impossible to keep a nut on the end of said hand rail; and plaintiff avers and charges that said defendant company, its servants, agents and employés, at the time and long prior to the time of said accident, knew that said

19 hand rail had no nut on the end of same, and for this reason was unsafe and dangerous, and with knowledge that said car was being used in interstate shipments and interstate traffic, failed, neglected and refused to provide said car with grab irons and hand holds, as provided by (page 26) statute; and also knew that on account of the fact that said nut had fallen off, or had been removed from the end of said rail, that plaintiff or some other employé when called upon to mount said car, would be thrown from said car and

seriously injured, or could have known each of the above facts by the exercise of ordinary care, caution and inspection; but plaintiff says that he was ignorant of any of the aforesaid defects, or the defective, unsafe and dangerous condition of said car and appliances thereon, until too late to avoid said accident and consequent injury; that said defendant company was guilty of negligence in allowing said car to leave Douglas or some other place where they had car inspectors and car repairers, without first inspecting said car, or causing same to be inspected and discovering the defects in said hand rail, and the absence of said grab irons and hand holds, and were guilty of negligence in allowing said car to be set out on the said track at Osborne in its aforesaid unsafe and dangerous condition without in some manner notifying plaintiff or his conductor of the defects in said car and appliances, and warning them of the danger they would encounter when called upon to move said car or switch same into their train.

Plaintiff says that at the time of said accident he was acting in the line of his duties and in the scope of his employment as brakeman, and was doing his work in the usual and customary and necessary manner in which all brakeman do their work while switching cars out on the road; that if said hand rail had been in a reasonably safe condition and had been properly fastened and maintained in the standard by means of a proper and sufficient not [nut] maintained on the end of said hand rail, the same could not and would not have pulled loose and he would not have been injured.

Plaintiff avers and charges that each and all of the aforesaid negligent and careless acts and omissions on the part of said defendant company failing to furnish him with a reasonably safe and suitable car and appliances was the direct (page 27) and proximate cause of his said accident and consequent injuries, for which said defendant company is liable.

Plaintiff avers and charges that when said hand rail or hand hold pulled loose or gave way, he was thrown and fell with great force and violence and struck his back and spine on the ends of some ties or cribbing built and erected by said defendant company near the place where he fell; that on account of the fact of his striking the ends of said ties he was thrown and fell to the ground with great force and violence and by reason of said fall and striking his back on the sharp ends of said railroad ties and on the ground and other hard substances, he was greatly, seriously and permanently injured, bruised, wounded and cut in and on his back, spine, legs, head and internal organs, causing a severe nervous shock and rendered a cripple for life; a more specific description of his injuries he is now unable to give; that by reason of the injuries received he was confined to his bed, unable to walk for about one year, and during said time suffered the most excruciating pains; that also by reason of said fall and injuries received in his back, spine and legs, his kidneys and bladder, together with the nerves and muscles by which same are controlled, were seriously and permanently affected; a more specific allegation of his injuries he is unable to give; that on account of the severe injuries received in his back, spine, legs and

kidneys, all the nerves and muscles of his legs, back, spine and entire body were so badly injured as to render him a cripple for life; that by reason of the severe blow received by him in the back, spine, hips and legs, the whole sciatic nerve of one of his legs was seriously and permanently injured and affected; a more specific description of his said injuries he is now unable to give; that he had reason to believe and does believe and here alleges that all the injuries above specified to his back, spine, legs, hips, kidneys, bladder and other internal organs, and especially injury to the great sciatic nerve, are serious and permanent, and will continue (Page 28) serious and permanent the remainder of his life; that on account of the injuries above mentioned, he has suffered and will continue to suffer the remainder of his life great bodily pain and mental anguish, and has paid out and incurred, and will be compelled to pay out and incur in the future a large sum of money for medicine, medical attention and nurses, which said sums heretofore paid out and incurred and hereafter necessarily to be paid out and incurred are all reasonable and necessary; that on account of each of the above injuries, his health now is greatly impaired, and will so continue impaired the remainder of his life; that he will not be able to walk without the assistance of a crutch or stick; that at the time of said accident, he was a strong, healthy, robust man, skilled in the business of railroading, and at the said time was earning the sum of One Hundred Dollars ($100.00) per month, which
21 earning capacity would have increased with his experience and years had he not been injured; that on account of the injuries from which he is now suffering, received at the time of said accident, he is wholly incapacitated from following the business and profession of railroading, or any other business or calling which requires hard manual labor, and for which reason he has suffered great pecuniary loss; that he is now twenty-eight years of age.

Plaintiff says that by reason of each of the aforesaid facts and negligent and careless acts and omissions above set out, he has been damaged in the total sum of twenty-five thousand dollars ($25,000.00).

Wherefore, all parties being before this Court, plaintiff prays that on final hearing, he have judgment for his said damages, and for costs of suit, and for such other and further relief as he may show himself entitled to in law or under the facts.

PATTERSON & WALLACE,
Attorneys for Plaintiff.

(Indorsed:) No. 5187. H. D. Vizard *vs.* El Paso & Southwestern (Page 29) Railway Company. Plaintiff's 1st Amended Original Petition. Filed this 25th day of January, A. D. 1906. I. Alderete, Clerk District Court, El Paso Co., Texas. E. B. McClintock, Deputy. Patterson & Wallace Attorneys at Law, El Paso, Texas.

Petition for Removal to U. S. Circuit Court, W. D. T., at El Paso, Texas.

In the District Court of El Paso County, Texas (41st Judicial District).

Petition for Removal to the Circuit Court of the United States for the Western District of Texas, at El Paso, Texas.

No. 5187.

H. D. VIZARD, Plaintiff,

vs.

THE EL PASO & SOUTHWESTERN RAILWAY COMPANY, Defendant.

To the Honorable District Court of El Paso County, Texas, Forty-First Judicial District:

Your petitioner, the El Paso & Southwestern Railway Company, respectfully shows to this Honorable Court that it is the de-
22 fendant in the above styled suit, which is of a civil nature, and that the matter and amount in dispute in this cause exceeds the sum or value of $2,000.00, exclusive of interest and cost.

That your petitioner is a corporation duly incorporated and organized under laws of the Territory of Arizona, and was a corporation duly incorporated and organized under the laws of said Territory at the time of the commencement of this suit and at all of the dates hereinafter mentioned, and was a corporation duly incorporated and organized under the laws of said Territory of Arizona during the whole of the months of January and February, 1906, and that the plaintiff, H. D. Vizard, is now and was at the time of the commencement of this suit, a resident of El Paso County, Texas, and is now and ever since the first day of January, 1906, has been a (Page 30) citizen of the State of Texas. And your petitioner states that this suit, as the same now exists, is one arising under the laws of the United States.

Your petitioner states that this action was commenced by H. D. Vizard by his original petition filed in this Court on April 18, 1904; that in said petition, said H. D. Vizard sought to recover damages against your petitioner on account of personal injuries alleged to have — received by him, basing his claim for damages upon certain acts of alleged negligence on the part of your petitioner or its employés, but not referring in any way whatever to any right whatsoever claimed by him under any law or statute of the United States, and not referring in any way whatsoever to any of the provisions of what is known as the Interstate Commerce Act of the United States, or what is known as the Safety Appliance Act of the U. S. Congress, and reference is here made to said original petition filed as aforesaid, and now on file in this Court.

That on the 25th day of January, 1906, said H. D. Vizard filed in this Court in said cause his first Amended Original Petition, to

which reference is hereby made. That said first Amended Original Petition was filed without any order authorizing the filing of same entered of record or noted upon the docket of the Judge of this Court. That your petition had no knowledge whatever of the filing of said first Amended Original Petition until Sunday, the 11th day of February, 1906, when one of your petitioner's attorneys, was told by one of the attorneys for the plaintiff, that said first Amended Petition had been filed; that your petitioner did not know of the contents of said first amended original petition, or that the plaintiff, H. D. Vizard, had alleged that your petitioner had been guilty of a violation of, or infraction of any statute or law of the United
23 States until Monday, February 12th, 1906, after one of its counsel was handed said first Amended Original Petition by one of the counsel for the plaintiff, H. D. Vizard; that in said first Amended Original (Page 31) Petition filed by said H. D. Vizard as aforesaid, he seeks to recover damages against your petitioner in the sum of $25,000.00, alleging that through the negligence of your petitioner, he received serious and permanent personal injuries on the 22nd day of February, 1904, while he was in the employ of your petitioner as brakeman at Osborne, in the Territory of Arizona; that when he, as such brakeman, attempted to mount a certain water car in use by your petitioner on the line of its railroad at said place, he, on account of the alleged negligence of your petitioner, was caused to fall, and through such negligence he sustained the injuries complained of by him, and as a ground of recovery and as a ground of negligence in said first amended petition, he alleges that said water car "did not have the usual, customary and necessary hand holds and grab irons maintained thereon;" that "in order to properly equip said water car it was the duty of your petitioner to have maintained on the standards of said water car through which said (a certain) hand rail was run, reasonably safe and sufficient hand holds to be used by employés in climbing on said car, and also reasonably safe, suitable and sufficient grab irons maintained at the end of said car as provided by the Statutes of the United States, and that your petitioner at the time of said alleged injuries had failed, neglected and refused to have maintained on said era any hand holds or grab irons on the standards, or any grab irons on the ends of said car;" and in said first amended original petition, said H. D. Vizard seeks to recover against your petitioner on the ground that plaintiff was injured as alleged by him from falling off of said water car, because said car, which was used in interstate shipment, was not properly equipped with all the safety appliances and grab irons as provided by the Statutes of the United States," and upon the ground that your petitioner was then using said car in interstate shipments and interstate traffic, and failed, neglected and refused to provide said car (Page 32) with grab irons and hand holds as provided by statute. And in said first amended original petition said H. D. Vizard alleges that your petitioner was using and operating said water car in the Territory of Arizona at the time of said alleged injuries, and was operating its railroad and cars, including

said water car, in said territory, and through said territory
24 into New Mexico Territory and into the State of Texas.

Your petitioner states that by the allegations in said first amended original petition, made by said plaintiff, H. D. Vizard, the application, interpretation and construction of the Statutes of the United States called the Safety Appliance Act, and the Statutes called the Interstate Commerce Act are involved, and the case of the plaintiff, as made by said first amended original petition, is one arising under the laws of the United States of America, and is one over which the Circuit Courts of the United States of America are given, by what is known as the Interstate Commerce Act, original jurisdiction.

Your petitioner states that it has caused this petition for removal to be prepared and filed as soon as possible after the discovery of the facts hereinafter alleged.

And your petitioner states again that it desires to remove at once this suit, before the trial thereof, into the next Circuit Court of the United States to be held in the Western District of Texas, at El Paso, Texas, and your petitioner offers here with good and sufficient surety for its entering in the Circuit Court of the United States for the Western District of Texas, at El Paso, Texas, on the first day of its session, a copy of the record in this suit, and for paying all costs that may be awarded by the Circuit Court of the United States as aforesaid if said Court shall hold that this suit was wrongfully and improperly removed thereto. (Page 33).

And your petitioner prays that the said surety and bond may be accepted, and that this suit may be removed into the next Circuit Court of the United States to be held in the Western District of Texas, at El Paso, Texas, pursuant to the Statute of the United States in such case made and provided, and that no further proceedings may be had herein in this Court, and it will ever pray.

MILLARD PATTERSON,
J. A. BUCKLER,
J. F. WOODSON,
Attorneys for the El Paso & Southwestern Railway Company.

THE STATE OF TEXAS, *County of El Paso:*

J. A. Buckler makes oath and says, that he is one of the attorneys of the petitioner above named, and that the facts stated in the foregoing petition are true.

J. A. BUCKLER.

25 Subscribed and sworn to before me, this the 14th day of February, 1906.

[SEAL.] MIKE FERREL,
Notary Public, El Paso County, Texas.

(Indorsed:) No. 5187. In the District Court 41st District (El Paso Co.). H. D. Vizard, Pl'ff, *vs.* El Paso & Southwestern R'y Co.,

Def't. Petition for removal to U. S. Cir. C't. W. D. T. at El Paso, Texas. Filed this 14th day of February, A. D. 1906. I. Alderete, Clerk District Court, El Paso Co., Texas. E. B. McClintock, Deputy.

(Page 34.)

Bond for Removal to U. S. Circuit Court.

In the District Court of El Paso County, Texas, 41st Judicial District.

Bond for Removal to the Circuit Court of the United States for the Western District of Texas, at El Paso, Texas.

No. 5187.

H. D. VIZARD, Plaintiff,
vs.
THE EL PASO & SOUTHWESTERN RAILWAY COMPANY, Defendant.

Know all men by these presents: That we, The El Paso & Southwestern Railway Company, as principal, and U. S. Stewart and J. M. Reynolds, as sureties, are holden and stand firmly bound unto H. D. Vizard in the penal sum of five hundred ($500.00) dollars, for the payment whereof well and truly to be made unto the said H. D. Vizard, his heirs, representatives and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and firmly by these presents.

Upon condition, nevertheless, that, whereas, the said El Paso & Southwestern Railway Company has filed its petition in the District Court of El Paso County, Texas, 41st Judicial District, for the removal of a certain cause therein pending the said H. D. Vizard is plaintiff and the said El Paso & Southwestern Railway Company is defendant, to the Circuit Court of the United States for the Western District of Texas, (said cause is numbered 5187 on the Docket of said District Court of El Paso County, Texas, 41st Judicial District, and is styled H. D. Vizard, *vs.* The El Paso & Southwestern Railway Company).

26 Now, if the said El Paso & Southwestern Railway Company shall enter in the said Circuit Court of the United States upon the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully and improperly (Page 35) removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof, we have hereunto set our hands this the 14th day of February, 1906.

THE EL PASO & SOUTHWESTERN RAILWAY CO.,
By M. PATTERSON, *Its Agent & Att'y.*
U. S. STEWART.
J. M. REYNOLDS.

THE STATE OF TEXAS, *County of El Paso:*

U. S. Stewart and J. M. Reynolds, both make oath and say that they reside in the County of El Paso, Texas; that they are freeholders therein, and that they are each worth the sum of Five Hundred ($500.00) Dollars over and above all property exempt from sale under execution.

U. S. STEWART.
J. M. REYNOLDS.

Subscribed and sworn to before me this 14th day of February, 1906.

C. J. DEAN,
Notary Public, El Paso County, Texas.

(Indorsed:) No. 5187. In Dist. Ct., El Paso Co., Tex. (41st Dist.). H. D. Vizard, *vs.* El Paso & Southwestern R'y Co. Bond for removal to U. S. Cir. Ct. Filed this 14th day of February A. D. 1906. I. Alderete, Clerk District Court, El Paso Co., Texas. E. B. McClintock, Deputy.

(Page 36.)

Order of Removal to U. S. Circuit Court.

In the District Court of El Paso County, Texas, 41st Dist.

FEBRUARY 14, 1906.

No. 5187.

H. D. VIZARD, Plaintiff,
vs.
THE EL PASO & SOUTHWESTERN RAILWAY CO.

27 The defendant herein having within the time provided by law, filed its petition for removal in this case to the Circuit Court of the United States for the Western District of Texas, at El Paso, Texas, and having at the same time, offered its bond in the sum of Five Hundred ($500.00) Dollars with U. S. Stewart and J. M. Reynolds, good and sufficient sureties, pursuant to the Statute and conditioned according to law.

Now, therefore, this Court does hereby accept and approve said bond and accept said petition, and does order that this cause be removed for trial to the next Circuit Court of the United States for the Western District of Texas, at El Paso, Texas, pursuant to the Statute of the United States, and that all other proceedings in this Court by [be] stayed.

(Recorded in Minute Book No. 3, at Page No. 193, District Court Minutes of the 41st Judicial District, El Paso Co. Texas.)

* * * * * * *

(Page 38.)

Clerk's Certificate.

THE STATE OF TEXAS, *County of El Paso:*

I, I. Alderete, Clerk of the District Court in and for the County of El Paso, State of Texas, do hereby certify that the foregoing 37 pages beside this, contain a full, true and correct transcript and copy of the record, and of all papers filed and all proceedings had in cause Number 5187, H. D. Vizard, *vs.* El Paso & Southwestern Railway Company as the same appears now on file and of record in my office.

Given under my hand and the seal of said Court, at office in El Paso, this the 19th day of March, A. D. 1906.

[SEAL.] I. ALDERETE,
Clerk District Court, El Paso County, Texas,
By L. M. DUNLAP, *Deputy.*

(Indorsed:) No. 424. In U. S. Cir. Ct. W. D. T. at El Paso, Texas. H. D. Vizard, *vs.* El Paso & Southwestern R. R. Co. Transcript of Record from Dist. Ct. El Paso Co., Tex., (41st Dist.). Filed March 20th, 1906. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

28 *Defendant's 2nd Amended Original Answer.*

Filed April 11, 1906.

In the United States Circuit Court, Western District of Texas, Sitting at El Paso.

No. 424.

H. D. VIZARD, Plaintiff,
vs.
EL PASO & SOUTHWESTERN RAILWAY CO., Defendant.

Now comes the defendant in the above styled cause, by leave of court, and files this its second amended original answer (in lieu of its first amended original answer heretofore filed in the District Court of El Paso County, Texas, on October 31st, 1904), and for such amendments, says:

(1.) That it denies all and singular the allegations in the plaintiff's said first amended original petition contained, and of this it puts itself upon the country.

Wherefore, etc.

PATTERSON, BUCKLER & WOODSON,
Attorneys for Defendant.

(2.) And answering further, said defendant says that by Article 2767 of the Revised statutes of Arizona, which was in force at the time of the accident mentioned in plaintiff's petition, it is provided

as follows: "Every corporation doing business in the territory of Arizona shall be liable for all damages done to any employee in consequence of any negligence of its agents or employees to any person sustaining such damage, provided said corporation has had previous notice of the incompetency, carelessness or negligence of such agent or employee."

And defendant says that by the statute above mentioned, all of the inspectors mentioned in the plaintiff's petition, were the follow [fellow] servants of the plaintiff, H. D. Vizard, and if the accident mentioned in plaintiff's petition happened through the negligence of any inspector or any employee of the defendant, whatever position he may have occupied, with respect to the defendant's business at the time of said accident, said employee was a fellow servant of the plaintiff. And the defendant says that if said accident happened through the incompetency, carelessness or negligence of any of its
29 agents or employees, it had no notice whatever of such incompetency, carelessness or negligence prior to said accident.

And answering further, this defendant says: That if the plaintiff was injured on account of the accident mentioned in his petition, he was injured in consequence of and as a result of an ordinary risk or an unnecessary risk assumed by him in the discharge of his duties as the employee of defendant.

And defendant further says, that if plaintiff was injured in consequence of the accident mentioned in his petition, he was injured through his own negligence, or in consequence of his own contributory negligence, in this, (1) That if he attempted to mount the car mentioned in his petition he attempted to mount it at an improper place and on the wrong side; (2), That he attempted to mount same in an improper way at a corner where there were no hand holds and no grab irons; (3), That he ignored the devices which had been placed upon the car for his use in mounting the car in safety; (4), That he should not have attempted to mount the water car mentioned in his petition, but should have caught the right hand corner of the front or the rear car, or some other car in the train; (5), That he should have mounted the car, if at all, at the right hand first corner on the engineer's side, which he failed to do; (6), That if he attempted to mount the car at all, as he alleges, he attempted to mount the same at an unnecessarily dangerous place, and in an unnecessarily dangerous way, whereas there was a reasonably safe way plain and open to him; (7), That the plaintiff failed to observe and made no effort to observe and comply with Rule No. 203 of Book of Rules of the defendant, under which he was working, which was as follows: "Brakemen must examine and know for themselves that the brakeshafts and attachments, etc., and other parts and mechanical appliances which they are to use are in proper condition and if not report them to the proper authorities that they may be put in order before using." (8) That the plaintiff failed to observe and comply with, and made no effort to observe and comply with Rule No. 202 of the Book of Rules of the defendant, under which he was working, which said Rule No. 202 provides as follows: "It is the duty of a brakeman to attend to the brakes, etc., and to assist the conductor in inspecting

the cars, and in all things necessary for the safe and prompt movement of the train," and that defendant is not liable to him as alleged in his petition.

PATTERSON, BUCKLER & WOODSON,
Attorneys for Defendant.

30 (Indorsed:) No. 424. In U. S. Cir. Ct. W. D. T. at El Paso, Texas. H. D. Vizard, *vs.* El Paso & Southwestern Railroad Co. Def't's 2nd Amended Orig. Answer. Filed April 11th, 1906. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

Plaintiff's First Supplemental Petition.

Filed April 11th, 1906.

No. ——.

In the United States Circuit Court for the Western District of Texas, at El Paso, Texas, April Term A. D. 1906.

H. D. Vizard, Plaintiff,
vs.
El Paso & Southwestern Railway Co., Defendant.

To the Hon. Judge of said Court:

Comes now plaintiff in the above styled and numbered cause, and after leave of Court first had and obtained, files this his first supplemental petition, and by way of answer to defendant's answer, says:

That at the time of his accident, and at all times prior thereto, he had never been furnished with a copy of the printed rules of said defendant; that at the time of his accident he was doing his work in the usual and customary manner, and way in which he had been ordered to do said work and switch said cars; that if there ever was a rule or regulation requiring plaintiff and other train employees to inspect their cars and appliances, then plaintiff says that said rule was unreasonable, and at the time and prior to said accident had never been enforced by said defendant company, but that plaintiff and all other employees at the time and prior to said accident, had with the knowledge, consent and permission of said defendant, and its duly authorized agents, habitually violated said rules and failed to make any inspection of the cars and appliances for defects, and plaintiff says that by reason of the fact that said rule had been habitually disregarded by the defendant's employees, and had never been enforced by said defendant company, the same had fallen into disuse, and had been abrogated; that at the time of said accident plaintiff was attempting to climb on to said car and hang thereon in the usual and customary manner and way in which said work was done by all the employees of defendant, as well as the employees of
31 all well regulated railroads in this country, and for this reason plaintiff says that he is not guilty of contributory neg-

ligence in attempting to mount said car and ride thereon in the manner and way in which he was doing at the time of said accident.

Wherefore, plaintiff prays that he have judgment for said damages and costs of suit.

PATTERSON & WALLACE,
Attorneys for Plaintiff.

(Indorsed:) No. 424. H. D. Vizard, *vs.* El Paso & S. W. Ry. Co. Plaintiff's 1st Supplemental Petition. Filed April 11th, 1906. D. H. Hart, Clerk. By Geo. B. Oliver, Deputy.

Judgment of the Court.

Entered in Minute Book 2, Page 431.

April 13th, 1906.

No. 424.

H. D. Vizard
vs.
El Paso & Southwestern Railroad Company.

Be it remembered that on this 11th day of April A. D. 1906, came on to be heard the above styled and numbered cause, the plaintiff appearing in person and by his attorneys, and the defendant appearing by its attorneys, and all parties announced ready for trial, whereupon came a jury, composed of L. M. Wilson and eleven others, all duly empanelled, qualified and sworn, who, having heard all the evidence, the argument of counsel, and the law as given them in charge by the Court, retired to consider of their verdict, and on this the 13th day of April, returned into open Court the following verdict, to-wit:

"We, the jury, find for the plaintiff and assess his damages at Nine Thousand ($9,000.00) Dollars. L. M. Wilson, Foreman."

It is therefore ordered, adjudged and decreed by the Court that the plaintiff, H. D. Vizard, do have and recover of and from the defendant, The El Paso & Southwestern Railroad Company, a corporation, the sum of Nine Thousand ($9,000.00) Dollars, together with interest thereon from this date at the rate of six per cent. per annum, and that said plaintiff do have and recover of and from the defendant all costs in this behalf expended and incurred for all of which execution may issue.

32 And it is further ordered by the Court that execution may issue in favor of the officers of this Court for all costs by each party in this cause, respectively, incurred herein.

Motion for New Trial.

Filed April 13th, 1906.

In U. S. Cir. Ct. W. D. T. at El Paso, Texas.

No. ——.

H. D. VIZARD
vs.
EL PASO & SOUTHWESTERN RAILROAD CO.

Now comes the defendant and asks the Court to set aside the verdict returned in this case of this date, and the judgment rendered on same, and grant it a new trial for the following reasons:

(1.) The verdict is against the great preponderence of the evidence and against the Court's general charge, and the special charges given by the Court at defendant's request.

(2.) The Court erred in refusing special charges, numbers 1 to 18 respectively asked by defendant.

(3.) The Court erred in not directing a verdict for defendant peremptorily as requested by defendant.

(4.) The Court erred in not instructing the jury, as requested by defendant, that if they believed there were hand holds and grab irons and the devices required by law upon the water car, and he failed to use them and mounted or attempted to mount the car where there were no devices for his use he cannot recover.

(5.) The verdict of the jury is excessive in this: the evidence shows that the plaintiff is young and his general health is good, and that in all probability his injuries are not serious, and that he will in all probability recover entirely in a comparatively short time, if he is injured at all.

PATTERSON, BUCKLER & WOODSON,
Att'ys for Def't.

33 [Indorsed:] No. 424. In Circuit Court of the United States. Western District of Texas. H. D. Vizard, *vs.* El Paso & S. W. Ry. Co. Motion for new trial. Filed this 13th day of April, 1906. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

Order Overruling Motion for New Trial and Granting 60 Days in which to File Bill of Exceptions.

Entered in Minute Book 2, Page 431.

APRIL 13TH, 1906.

No. 424.

H. D. VIZARD
vs.
EL PASO & SOUTHWESTERN RAILROAD CO.

On this day the plaintiff in open Court having remitted Three Thousand Dollars of the verdict and judgment rendered herein on this date, and the judgment having been reduced to the sum of Six Thousand Dollars, the defendant's motion for a new trial, is overruled, to which action of the Court in refusing a new trial, the defendant in open Court excepted.

And upon the request of defendant's counsel, it is ordered by the Court that the defendant be and it is hereby allowed sixty days from and after the adjournment of the Court in which to prepare, present for approval and file its bills of exceptions.

Plaintiff's Remittitur.

Filed April 13th, 1906.

In U. S. Circuit Court, W. D. T., El Paso, Texas.

No. 424.

H. D. VIZARD
vs.
EL PASO & SOUTHWESTERN RY. CO.

Comes now, plaintiff, H. D. Vizard in the above styled cause and remits from the verdict and judgment recovered in this case
34 on the 13th day of April, 1906, the sum of $3,000, and asks that the defendant's motion for new trial be overruled.

PATTERSON & WALLACE,
Att'ys for Plaintiff.

(Indorsed:) No. 424. H. D. Vizard *vs.* E. P. & S. W. Ry. Co. Plaintiff's Remittitur. Filed this 13th day of April, 1906. D. H. Hart, Clerk, by Geo. B. Olover, [Oliver], Deputy.

Judgment Entered After Remittitur.

Entered Minute Book 2, Page 432.

April 13th, 1906.

No. 424.

H. D. Vizard
vs.
El Paso & Southwestern Railroad Company.

Be it remembered that on the 13th day of April, A. D. 1906, a judgment was rendered in the above styled and numbered cause, in favor of the plaintiff and against the defendant for the sum of Nine Thousand ($9,000.00) Dollars, and

Be it further remembered, That on this 13th day of April, A. D. 1906, came on to be heard the motion of defendant for a new trial heretofore filed in this cause, and, all parties having appeared and announced ready for trial upon said motion, and the Court having heard the said motion, intimated that, in the opinion of the Court, the said verdict and judgment heretofore rendered in said cause is excessive to the extent of Three Thousand ($3,000.00) Dollars, and thereupon in open Court the plaintiff duly filed in said cause remittitur for said sum of Three Thousand ($3,000.00) Dollars, praying that he have judgment for the remainder, viz., the sum of Six Thousand ($6,000.00) Dollars.

It is therefore considered, ordered and decreed by the Court that said remittitur for the said sum of Three Thousand ($3,000.00) Dollars be entered, and that the said judgment be reduced to the sum of Six Thousand ($6,000.00) Dollars, and it is therefore by the Court Considered, ordered and adjudged that the plaintiff H. D. Vizard, do have and recover of and from the defendant, The El Paso & Southwestern Railroad Co. (a corporation), the sum of Six Thousand ($6,000.00) Dollars with interest thereon from
35 this date at the rate of six (6) per cent. per annum, together with all costs of suit in this behalf expended and incurred, for all of which let execution issue, and

It is further ordered by the Court that the officers of this Court do have and recover of and from the parties to this cause all costs by them respectively incurred, and

Be it further remembered, That in this cause, the Court having fully considered the said motion for a new trial, it is by the Court in all things overruled and denied.

To which action of the Court in overruling said motion for a new trial, said defendant in open Court, by its attorneys, excepted, and, upon the application of the said defendant it is further ordered by the Court that said defendant be and is hereby allowed sixty days from and after this date in which to prepare, present for approval and file its bills of exception herein.

Order Granting Leave to Send Exhibits to Circuit Court of Appeals.

Entered Minute Book 2, Page 435.

EL PASO, TEXAS, SATURDAY, *April 14th*, 1906.

No. 424.

H. D. VIZARD, Plaintiff,
vs.
THE EL PASO & SOUTHWESTERN RAILWAY CO., Defendant.

At the request of counsel for defendant, it is ordered by the Court that the two photographs marked Deft's Exhibits A and B of E. P. & S. W. Water car No. 522, introduced in evidence by defendant in the above styled cause, and the two photographs marked Ex. A & B, introduced by plaintiff, be transmitted by the Clerk to the Appellate Court for inspection in case, this cause is taken to the U. S. Circuit Court of Appeals (5th Circuit) by Writ of Error.

36 *Defendant's Bill of Exceptions.*

Filed June 11, 1906.

In the United States Circuit Court, W. D. T., at El Paso, Texas, April Term, 1906.

No. 424.

H. D. VIZARD
vs.
EL PASO & SOUTHWESTERN RAILROAD COMPANY.

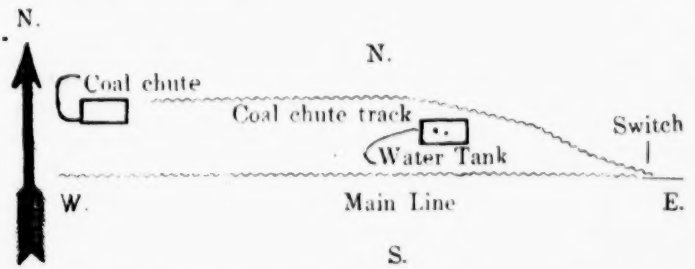
Be it remembered that upon the trial of the above styled cause at the April term, 1906, of the U. S. Circuit Court, W. D. T., at El Paso, Texas, the following was all the evidence introduced.

The plaintiff H. D. VIZARD, testified on behalf of himself as follows:

My name is Harry Vizard; my age is 30 years. I was employed in 1904, as a freight brakeman for the defendant, the El Paso & Southwestern Railroad Company. I had had about ten years' experience at that time in switching and braking. At the time of the accident complained of, in February, 1904, I had been working for the defendant since January 1, 1904. The accident occurred at Osborne, Arizona Territory. I was braking at the time. We were running from Naco towards Douglas, Arizona, that is, easterly, and had orders to stop and pick up a water car at Osborne. This water car was a flat car with a tank put on it, a temporary water car. It had a hand rail at the sides and had upright posts which this hand

rail extended through, and on each end of the hand rail was supposed to be a nut to hold the hand rail in position. That is all there is about the car. I held on to the two head cars as we came up the main line, and we came in on the side track where the coal chute was, and coupled to this water car and got a signal from the conductor to back up towards the coal chute and pick up another car at the coal chute. The conductor gave me the signal to pull out, and as we pulled out towards the switch easterly, this water car came by me. I reached up and put my foot upon the journal box of the truck of the car and as my weight got to the hand railing of this car it gave way and I fell back and struck my spine and hit on the end of some cross ties upon which a temporary water tank was resting, and I lay there unconscious for a few minutes and urinated all over myself.

37 The following diagram indicates the points and places referred to by witness:



I caught hold of the hand rail about 4½ feet from the end of the car. About 2½ feet from where [the] hand rail goes through standard.

I got up myself with great trouble and the conductor and a man by the name of Eubanks, who was on the other crew, assisted me to his caboose, and I was taken to Douglas to the hospital. I staid in Douglas, Arizona, in the hospital about 24 hours. I was taken from the hospital to the hotel in Douglas, and I staid in the hotel in Douglas until about the 5th of March, 1904. The accident happened on February 22, 1904. The usual and customary way of brakemen getting on this car, at the time of the accident, was to put their feet on the journal box and reach up and catch this hand rail. I had no trouble in catching the hand rail at all. The ground there at the time was about level with the ties.

The witness was here shown two photographs of a water car, marked Pl'ff's Exhibits "A" and "B" (Not the water car from which he claims he fell, but of another water car having iron standards). The witness stated:

The car from which I fell had wooden upright standards and an iron rod run through the top of the upright standards and was supposed to have a nut on each end to hold it or keep it from pulling out. The iron rod which ran through the wooden upright standards was

three-fourths of an inch in diameter. The car had nothing at all on it except this hand rail around the car. The number of the water car was 522 of the El Paso & Southwestern make. There was no nut on the end of the iron hand rail at the southwest corner of the car, the place at which I attempted to get on and fell. At the time I took hold of the iron rail, I had no knowledge of there being
38 any defective condition of the same. My purpose in getting on that car was to ride out to the switch to throw the switch. The switch was 40 or 50 yards away in an easterly direction. It was necessary to throw the switch so we could back our train and get ready to go. We were to take this water car to Douglas. The conductor of our train was Mr. Silcox. He was down by the coal chute at the time of the accident. When we first backed in on the coal chute track, the engine was attached to two box cars. The engine backed in and the two box cars were first coupled on. The two box cars were then backed down and I made the coupling of the box cars to this water car. The conductor then gave me a signal and I gave the engineer a signal to back on down to the coal chute. I then stood still near the temporary water tank. The conductor coupled the water car at the west end to another box car down at the coal chute. I then gave a signal for the train to pull out, and as it came by me I tried to catch this water car. The car was going at the time about four or five miles an hour. Fred Grubb was braking with me. He left and went to Mexico and died. I do not remember the name of our engineer. Mr. Eubanks was braking on the other crew. He was near me at the time of the accident. I came to El Paso from Douglas about March 5, 1904. I was in an awful condition then. I could hardly walk without assistance. I employed a physician, Dr. Sinks, when I came to El Paso. I afterwards employed Dr. Bush. Dr. Bush treated me for a number of months. Dr. Higgins also treated me, and Dr. Anderson, the last spells I had. I also had Dr. Woodruff. I was confined to my bed for eight months, suffering all the time. I had very little relief. Part of the time I was unconscious. Did not know what was going on at all, and had to have injections of morphine to ease my pain. Dr. Bush visited me a great many times. He was there sometimes twice and three times a day. I used crutches about three months after I got out of bed, and since that time I have been getting around on my cane. I was earning at the time of the accident $100.00 a month. Prior to the accident I was a strong, healthy, fine man physically. I had stood several physical examinations. Was examined for the army during the Spanish and American War. Always passed a good physical examination. I had never before the time of the accident suffered from any accident, and never had been sick in my life before. My health had been very bad since I was injured. I suffered very much from my bladder. I am now just about making a living in the second-hand furniture business. I work pretty hard in the second-hand furniture business, because I have to, and at
39 night, when I am through my work, I have a heavy pain right in the spine of my back, my legs are dragging and I I can barely get along. I can now get around the street without my

cane, but when I go for a long walk I have to take my cane, because I give out if I haven't got my cane. Every now and then I am taken down with spells. The spells last a week sometimes, and I can't do a thing. I suffer intensely whenever I have the spells.

I am familiar with the usual and customary way in which brakemen perform their duties in running trains and switching cars. It was not usual and customary and was not a part of my duty to inspect the cars and appliances at the time of the accident. It has never been customary for brakemen to do such work on any railroad I ever worked for. It was no part of the brakeman's duty to inspect that hand rail. I had never been instructed to do that. I was doing my work at the time of the accident under the instructions of the conductor.

As I have said, the water car was being pulled in an easterly direction at the time of the accident, and as the water car passed me, I attempted to catch on the southwest corner of the same at the rear end of same. Two box cars were ahead of the water car. I caught hold of the iron hand rail at the southwest corner of the car and the hand rail pulled out of the standard and I fell and struck my spine on the cross ties of the temporary water tank. I had no trouble in reaching the hand rail. The accident happened about 3:15 o'clock P. M.

(N. B.—Before the cross examination of H. D. Vizard by counsel for defendant, it was shown that this case was tried in the District Court of El Paso County, Texas, in the latter part of the year 1904, and that H. D. Vizard testified upon said trial.)

Cross-examination.

By Counsel for Defendants

The witness, H. D. Vizard, testified on cross examination as follows:

Q. Mr. Vizard, you testified in this case before didn't you?

A. Yes, sir.

Q. I want to know if you didn't say on the trial of this case before that you didn't know whether that car had a stirrup and hand holds at the other end or not?

A. Well——

Q. Just answer my question; I want to know if you didn't say that?

40 A. I might have said it.

Q. If you said it, it was true?

A. If I said it it was true?

Q. Yes?

A. It might have been true.

Q. Well, did you say that or not, that you didn't know whether this car on which you got up and from which you got the fall had a grab iron and hand holds in front or not?

A. I don't remember.

Q. You don't remember whether it had or not?

A. Here, since I have got to thinking about it, there was none on it.

Q. Since you got to thinking about it?

A. Yes, sir.

Q. Still, you swore in the State Court that you didn't know whether it had a grab iron or not?

A. Yes, sir; in the State Court I was in an awful predicament, too.

Q. We will get to your predicament after a while; I want to know about your testimony. I will ask you again if you didn't state that you didn't remember, didn't know whether that car had a grab iron and hand hold in front or not?

A. Well, I don't remember.

Q. Don't remember whether you said it or not?

A. No, sir.

Q. Didn't you say in the State Court that you didn't remember whether that car had a stirrup or not in front.

A. I don't know.

Q. Don't know whether you said it or not?

A. No, sir.

The witness H. D. VIZARD testified further on cross examination:

I was on the south side of the water car as it pulled out by me. The engine was going east. I attempted to get on the southwest corner of the car as the same came by me. The nut that I say was lacking should have been on the southwest corner of the car at the end of the hand rail. I attempted to catch about 2½ feet from the west end of the iron railing. The journal or oil box on which I put my feet was about five feet from the rear end of the car. The iron hand railing is about ¾ of an inch in diameter. I could put my foot on the journal box without any trouble. The end of the iron rail is about two feet from the end of the car. I caught the iron rail about 2½ feet from the end of the rod—that is, the end
41 of the upright standard. The distance from the end of the upright standard to the end of the car is about two feet. Up to the time this case was tried in the State Court in the latter part of the year 1904, I used crutches all the time. I was in bed about two weeks after the case was tried. I laid aside my crutches, I think, about three months after the case was tried in the State Court. The case was tried in October, 1904. I went into the second-hand business about December 19th, 1904. When I went into the second-hand business in December, 1904, I worked about the store without my crutches and without a cane. I lifted stoves a little. I lifted furniture and transacted the business of my second-hand store.

After the accident, I went to the hospital, as I have stated, and staid about 24 hours, and then went to a hotel in Douglas. I came down to El Paso on March 5th, 1904. After I left the hospital in Douglas, Dr. Armstrong waited upon me at the Hotel. At the time of the accident I knew of a standard rule of railroad companies generally about the matter of brakemen and employees examining the appliances that they were to use, and exercise ordinary care to

see that the appliances are in good order as they discharge their duty. I also knew of a standard rule among railroad companies generally that brakemen must assist the conductor in examining to see that the apparatus is in good order. I didn't have a copy of the defendant's books of rules before or at the time of the accident.

At the time of the accident, as the water car passed me, I attempted to jump, or did jump, and attempted to catch the iron railing. On the trial of this case in the State Court, I testified that I tried to catch hold of the iron railing and it pulled out. I made a jump at it and the rail pulled out. And I now say that that is true. And I also stated on the trial in the State Court that I had never worked for a railroad company in my life where it was possible to keep things in order all the time. Anything will wear out. Bolts will work loose and nuts will work loose. On the trial of the case in the State Court, I said that when there was a stirrup and hand hold, the usual and customary way is for brakemen to use the hand hold and stirrup if the hand hold is in the proper place, and I say that now. The rule is for brakemen to work on the engineer's side; that is, on the right hand side of a train as an engine is pulling the same. I weighed about 170 pounds at the time of the accident. My height is 5 feet 5¾ inches. When a brakeman can see the engineer, the proper side of a train for him to work on is the right side or the engi-
42 neer's side. I was on the south side of the train, or the engineer's side, at the time of the accident.

On redirect examination, the witness stated:

At the time of the accident my left foot was on the truck.

I do not remember whether both hands caught hold of the hand rail or not, it was done so quick. I never worked on any railroad where a brakeman was required to inspect the appliances on a car other than the air. It was not my duty to inspect such appliances or apparatus as the hand rail.

On recross examination, the witness said:

The standard rule I have mentioned makes it the brakeman's duty to inspect all the apparatus and attachments of a car in a reasonable way and report any defects he may observe. If in the discharge of my duty I saw anything out of repair, I would report it to the car repairer. I observed the standard rule I have mentioned to that extent. I did not hunt up repairs. When I was in the railroad service, whenever I saw anything out of order I would report it. I do not knew whether other brakemen did the same thing or not. I reported anything I saw out of order. As far as I know, it is the practice of railroad brakemen to report defects which they observe. That is as far as I know about the matter. I have been on the street a great deal during the past 12 months and during the past 18 months, walking up and down the sidewalks pretty fast, sometimes as fast as an ordinary man would walk. I have walked with my cane. I get along pretty fast with it.

R. A. EUBANK, a witness for plaintiff, then testified by deposition as follows:

That his name is R. A. Eubank; that at the time of the accident he was employed as a brakeman for the defendant. That he is now working for the G. H. & S. A. in El Paso. That he was acquainted with the plaintiff. Came up to the scene of the accident before plaintiff had been picked up from the ground. Accident happened on the 22nd day of February, 1904, at Osborne, Arizona. The train on which plaintiff was working was ahead of our train and I was in our caboose. The conductor in charge of plaintiff's train had been ordered to pick up a couple of cars at Osborne, one of which
43 was a water car. The cars were standing on a side track. Before the accident happened, I left my caboose and went up to where the other train was, to see if we could get our train around theirs, in order to get ahead of them into town. Just as I got up to where these cars were standing, they were picking plaintiff up from the ground and assisted them in taking him to my caboose, where we put him to bed. I took his place as brakeman on their train. I do not know what plaintiff was doing just before he was hurt. I examined this car a few minutes after the accident and found a hand rail pulled loose from the standard. It was bent and sticking down near the ground, so that if the car had been backed up it would probably have run into the ground. Mr. Grubb and myself bent the hand rail back and placed it behind the post. I examined the hand rail carefully at this time and found that there was no nut on the end of the hand rail, and that this hand rail had pulled out from the standard. At the time I examined the water car, it was standing on the main line, near the place where I assisted in picking plaintiff up from the ground. This hand rail was placed and maintained on the water car for the use of the employees. It consisted of a long iron bar running through upright standards and the end is maintained in the standard by means of a nut. The hand rail extended into the standard at each end of the car. The nut is then screwed on the end of the hand rail and held in the standard. There is room for a man to walk between the hand railing and the tank. This hand rail is used to keep a man from falling, and also to be used by brakemen and other employees as a hand rail in climbing on and off cars. The tap or nut on the end of this hand rail was gone. I discovered the defects in this hand rail by making examination while the car was in Douglas early that morning, and also by examining the same a few minutes after the plaintiff was hurt. As near as I now remember, this was E. P. & S. W. car No. 522. While I did not see the plaintiff fall, I am positive this is the car from which he fell, as I found him lying very near the car, and also discovered the hand rail bent out of its regular position. The train on which I was working picked up this water car at Douglas, in the morning before the accident. I was present and assisted in placing the car in the train. We hauled it to Osborne, and then set it out on the sidetrack. While we were doing some switching at Douglas on the morning of the 22nd of February, 1904, the brakeman who was working on the train with me called my attention to

the fact that this car had a defective hand rail, and told me to be careful and not use this hand rail. I then examined the hand
44 rail and found that the nut on the end which held the hand rail in the standard was gone. The end of the hand rail at the time I examined it was rusty. Our train turned at Naco and was going back to Douglas when we caught up with the plaintiff's train, which accounts for my presence at Osborne at the time of the accident. I don't know whether this defect had been reported to the company or not.

R. S. CLAYE, a witness for the plaintiff, testified as follows:

I know the plaintiff; have known him about eight years. I was working for the defendant out of Douglas, Arizona, on and prior to February 22nd, 1904. The plaintiff, Vizard, was working there at the time. I was at Douglas at the time he was hurt. I saw him after he was brought to Douglas. He informed me after he was brought to Douglas of the number of the car on which he got hurt, or is alleged to have gotten hurt. I went out on a freight train the next morning, and I saw this water car the next morning in the Douglas yard before I went out. It was on a water track. I examined it after it was picked up in the yard. I picked it up and it was switched down to the yard. It was put into our train. I examined it with reference to the hand rails. The hand rail was bent down and out of socket on the inside of the stake. It had no nut on the end of it. I examined the place where the not is usually fastened, the end of it. It was rusty. I saw car repairers there at the time. A nut was put on the hand rail before the car went out that morning. The hand rail was run through the top end of some stakes, four or five stakes, that were set alongside of the car, and the hand rail had got a nut on each end. The object of the nut was to protect the hand rail from pulling out. The hand rail was there for getting on and also when walking along the side of the car. It was used by men on the ground and by men on top of the car. If a man wants to use it from the ground, he grabs it; it has a long iron on there to grab.

Q. Well, now, then, suppose this car was going by you at a rate of three or four miles an hour and you wanted to ride out two or three car lengths, how would you get on that car?

A. I would put both hands on the rail and my foot on the journal, on the box.

Q. I will ask you to state whether or not you examined this car with reference to having any hand holds on the stakes, standards set up?

A. Did I examine that particular car?

45 *A.* Yes, sir; with reference to whether it had on it any——

A. I examined it.

Q. State whether or not it had any hand holds on these stakes?

A. There were no hand holds on the stake.

Q. How about grab irons?

A. There was none of them.

The COURT: Hold on what?

The WITNESS: On the stakes.

Q. You say there was no hand hold on this?

A. No, sir.

Q. Now, with reference to the grab iron; you know what a grab iron is?

A. Yes, sir.

Q. This car had no grab iron on it?

A. No, sir.

Q. Well, I will ask you this: What was the condition of Mr. Vizard's health before the accident?

A. Never was sick that I knew of.

Q. Never was sick that you knew of, and you knew him how long?

A. About eight years.

Cross-examination.

By DEFENDANT'S COUNSEL:

Q. Mr. Claye, you and Mr. Vizard were comrades, companions and "pals," to use a common expression, for several years before this accident happened?

A. Yes, sir.

Q. You are yet, ain't you?

A. Yes, sir.

Q. You went down to see this car the morning after the accident?

A. Yes, sir.

Q. Are you willing to swear that the car didn't have any stirrup on it?

A. No, sir; it had no stirrup.

Q. Had no hand hold, had no grab iron and had no stirrup?

A. No, sir.

Q. Didn't you testify on the former trial of this case in
46 the State Court that it did have a hand hold and did have stirrups?

A. I don't remember.

Q. Don't remember whether you did or not? Have you talked to anybody about this case, a lawyer or anybody else, about the necessity of your testifying on the stand here that that car didn't have hand holds?

A. No, sir.

Q. Haven't talked to anybody. Have you discussed with a lawyer or anybody else the matter of your saying that that car didn't have grab irons?

A. Discuss it?

Q. Yes, sir?

A. With Mr. Patterson (counsel for plaintiff); yes, sir.

Q. When?

A. Several times.

Q. When?

A. Several times.

Q. Lately?

A. Yes, sir; lately.

Q. And several times lately you have discussed with him the necessity of saying that that car had no hand holds and no grab irons?

A. Yes, sir.

Q. And you also discussed the necessity of saying it didn't have a stirrup?

A. Yes, sir.

Q. Mr. Claye, if that car didn't have hand holds and didn't have grab irons and didn't have a stirrup or stirrups, on the former trial of this case in the State Court, why didn't you say so?

A. I don't remember telling it; I never said it.

Q. Sir?

A. I never said it at the time.

Q. You didn't say it before?

A. No, sir.

Q. You described that car and the hand rail and you said it was there and didn't have a nut on the end of it; now I want to know; you knew what a grab iron was when Mr. Wallace asked you about it, didn't you?

A. Yes, sir.

Q. You understood what he meant; a grab iron is on the——

A. On the standard.

Q. You knew what he meant?

A. Yes, sir.

Q. Why didn't you state that that car had no hand hold
47 or no grab iron or no stirrup on the trial of this case in the State Court?

A. I didn't see it.

Q. Why didn't you say so; I say, why didn't you?

A. Because there wasn't any.

Q. Well, why didn't you tell the Court and jury down there it had no hand holds and no grab irons and no stirrups?

A. I did tell the Court.

Q. You say you did?

A. Yes, sir.

Q. On the former trial of this case?

A. Yes, sir; the only grab iron there is is this hand rail; we call it the grab iron.

Q. That is all this car had?

A. Yes, sir; that is all this car had; to the best of my knowledge, that is all the car had.

Q. What do you mean by to the best of your knowledge; that is the best of your remembrance?

A. Yes, sir; best of my remembrance, it had no stirrup and no grab iron.

Q. You might be mistaken about that, might you not?

A. No, sir.

Q. You are certain about it now; still you qualified it a while ago, "to the best of your knowledge?"

A. To the best of my knowledge; yes, sir.

Q. You say you made that statement in the State Court, did you?
A. Yes, sir.
Q. Now, I am talking about this not having a hand hold and not having a stirrup there at this corner where Mr. Vizard fell off; did it have a grab iron or stirrup or hand hold on it anywhere at any corner?
A. No, sir.
Q. Didn't?
A. No, sir.

The witness Claye further testified on cross examination:
That he stated while on the stand, on the occasion of the trial in the State or District Court, that when he saw the nut off on the end of the hand rail, it was at the southwest corner of the car, and he testified that he did not state on the trial in the State Court that he found the nut off at the northwest corner of the car. I quit my job at Douglas and came down here to El Paso with the plaintiff, Mr. Vizard.

48 R. P. MOORE, a witness for plaintiff, testified as follows:

My name is R. P. Moore; my business is that of railroad work in train and car service. I have seen cars, ordinary flat cars, that have been converted into water cars. In the case of such water car, a cut is made through the floor, through which stays are placed, and an iron tank placed on same, and they are connected by a hand rail of some character. The iron rod or hand rail goes through upright pieces that are inserted in the side of the car, known as standards. The iron rod is inserted through the standards by means of augur holes and secured with a nut, or secured in some manner. If this water car were being pulled out of the coal chute track at Douglas, in an easterly direction, I would consider it fair practice for a brakeman to attempt to grab the hand rail and put his foot on the truck or oil box and ride out on the car in that position to the switch.

Cross-examination.

By DEFENDANT'S COUNSEL:

Hand holds and stirrups and grab irons are safety appliances to assist the employees and those that are working on the cars for their safety and assistance. Their primary specific purpose is to enable employees to get on the cars or to hang on the side. If an engine were headed east and were pulling this car east and there was an upright stake at one corner of the car, the southeast corner of the car, with a hand hold on the side of the car at the corner, and a grab iron on the bottom or end of the car, and a stirrup on the car at that corner, if the car were approaching me, I would ordinarily get on the car at the corner where the stirrup and hand hold and grab iron and these appliances were. That would be the ordinary place where an employee or brakeman would get on the car. If this appliance were there, I would say that is the safest place. That is what they are

put there for, and that is why the law requires them to be put there.

On redirect examination the witness testified:

There is no standand height for the stirrup. Some stirrups are possibly a foot and I have seen them longer than that. For a man of my size, with my foot in the stirrup, holding on to the hand hold I would be rather cramped. I would be in an easier position with my foot on the oil box and having hold of the hand rail.

49 The proper position would be for the party employed to avoid any danger to employ these appliances that are put on a car for this purpose. If they were not there, he would possibly employ something else. If they were not there and he caught hold of the hand rail and put his foot on the oil box, as I said a moment ago, I would consider that fair practice.

On recross examination, the witness testified:

That if a man should attempt to get on the rear corner of the car, if he should slip or fall there would be danger of a car behind running over him. It is true that a brakeman mounting a car as the engine pulls a car by him should take the first right hand corner of the car. The presumption is that he should do it.

Doctors I. J. Bush, G. H. Higgins and C. H. Woodruff testified on behalf of plaintiff as to their opinion of the extent of the injuries from which plaintiff claims to have suffered, and Dr. Chas. T. Race and H. E. Stevenson testified on behalf of defendant as to the same matters, and it is admitted that their evidence would justify a verdict and judgment (if plaintiff were otherwise entitled to recover) for the sum of six thousand dollars.

Here plaintiff rested.

It was here admitted that this case was tried in the District Court of El Paso County, Texas, at the October Term, 1904; that the evidence in the case on the trial in the District Court of El Paso County was taken down by A. B. Redding, stenographer, and that his report of the testimony in the hands of counsel for defendant on this trial in the U. S. Circuit Court was correct, and it was shown by the stenographer's report of the evidence that on the trial of the case in the District Court of El Paso County the plaintiff, H. D. Vizard, being shown a picture of the water car, testified as follows:

Q. Now, Mr. Vizard, we will say that that picture is a correct picture of the car as it was going east, and you got on at this corner down here (indicating the southwest corner)?

A. I got on at that corner (indicating the southwest corner). If there was a stirrup on the other end I do not know. There was none where I got on. I got on at the corner, at the end of the car and right hand of the engine.

50 It being admitted that the report of the evidence made by A. B. Reading upon the trial of the case in the District Court of El Paso County, Texas, was correct, counsel for defendant read from the same the following evidence of R. S. Claye, given by him upon cross-examination on the trial of the case in the District Court of El Paso County, in October, 1904. It was shown that the wit-

ness, R. S. Claye, was testifying on said trial about the water car mentioned in the evidence, to-wit: El Paso & Southwestern Water Car No. 522.

Question. Explain what kind of car this was?

Answer. Regular water car, used on all roads.

Question. How were the hand rails made on the car?

Answer. Well, there are four posts, standing on the side, and there is a rod through them, and there is a hand hold on the car there and a grab iron in handling cars to grab on.

Question. How was that grab iron or hand hold fastened to the post?

Answer. There is a hole and that rod is fastened through that.

Question. I will ask you whether or not this particular car had any steps on it, or other hand holds other than this long piece?

Answer. There are steps for a stirrup to step on hung below the car.

Question. Whereabouts is this stirrup?

Answer. There is one on each side of the car.

Question. I will ask you if there were stirrups on this particular car?

Answer. Yes, I think there was.

Question. Where were they with reference to where you found this bent down, the iron rod?

Answer. It was on the other end.

Question. Now, with reference to that rail, was there any stirrup under this bent rail?

Answer. I couldn't say; I think it was on the other end; I know there is one on that side; I think it is on the other end.

Again, on cross examination, he said:

Question. (After being interrogated by the plaintiff's counsel as to the customary way of mounting a car.) What is the usual manner of mounting a car; just suppose a car to be coming by at a slow rate of speed and you want to ride the car out?

51 Answer. They have a stirrup there, but they never use the stirrup.

Question. You found the bent rail on car 522 and it was at the southwest corner of the car looking west?

Answer. The northwest.

Question. Looking west, that bent rail was on the west end of the car?

Answer. Yes, sir.

Question. Are you positive of that?

Answer. I am positive that it was on the northwest corner of the car.

Question. That is the bent rail you saw, is it?

Answer. Yes, sir; that is where the nut was gone; the nut was gone on both ends, west and east.

Question. The rail at the east end was not bent?

Answer. No, sir; that was all right; it had no nut on it.

Question. You are positive of that?

Answer. Yes, sir.

Question. And positive that this bent rail was on the northwest corner of the car looking west?

Answer. The northwest corner of the car.

Question. You know that, do you?

A. Yes, sir.

H. H. DICK, a witness for defendant, testified as follows:

My name is H. H. Dick. I was employed by the defendant as a car inspector at Douglas, Arizona, on February 22nd, 1904. Had been car inspector for last four years. I know El Paso & Southwestern Water Car No. 522. I had occasion to inspect it in the month of February, 1904, and I was familiar with the car through my inspection.

The witness was here shown photographs introduced in evidence, which were marked Def't's Exhibits "A," and he says:

I recognize this photograph of that water car No. 522. It is a correct photograph of the car showing the east end of the same. The witness was here shown photograph marked Deft's Exhibit "B." I recognize that photograph as a correct photograph of the west end of the water car mentioned, No. 522. I know that these are correct photographs of the car as it appeared at the time of the accident in the month of February, 1904. The letters "B. O." shown in the photograph were not on the side of the water car in February,
52 1904. In doing my work I was called upon to handle that car. I know that on the 21st and 23rd days of February, 1904, that water car had on it at the two corners indicated a stirrup and grab iron and hand holds, and the devices indicated there. The car went out of Douglas on the morning of February 22nd. I did not see it on the morning of February 22nd. I saw it on the afternoon of February 22nd and saw it on the morning of February 23rd. I first heard that Mr. Vizard claimed to have fallen from the car on the morning of February 23rd. I then made an examination of the car, and when I examined it on the morning of February 23rd I know that it had the hand holds, grab irons and stirrups. I am certain of that. I heard that Mr. Vizard had fallen from the car and went down and looked at the car. I found that there was a nut off of one end of the guard rail. I do not remember now at which corner the nut was off. There was one nut off. Whe[illegible] saw it on the morning of February 23rd I remember of having s[illegible] it before. I had repaired the car when it came in from the east on the evening of February 21st. I put a nut and washer on the end of one of these rods. I inspected the car. I put the nut on after I inspected it on the evening of February 21st, 1904. After I inspected the car and put a nut on the end of the hand rail there was nothing the matter with the car. There was no nut off either hand rail after I put that nut on. When I saw the car on the morning of the 23rd I recognized the washer and the nut over the same that I had put on on the evening of February 21st. When I saw the stirrups and the hand holds and grab irons that are indicated on the photograph, on the morning of February 23rd, 1904, they appeared as though they had

always been on there ever since they had turned the car out from the shops. I have had quite a bit of experience in the railroad business building and repairing cars and as inspector. I have been employed about the yard where cars were switched. The grab iron on the side and the one on the guard rail standard is for mounting the car and the other on the end is for use in operating the lever. If this car were being pulled in an easterly direction the grab irons and hand holds would be for the use of a man in mounting the car. That is what they are there for.

On cross examination the witness said:

I live in Naco at present. I am now the car inspector of the defendant. The water car was used at the time of the accident for hauling water. It is in constant use on the road. I have had
53 about eight years' experience in inspecting cars. I do not remember whether the nut I found off of the hand rail was at the southeast corner of the car or what corner it was. I found a nut off and put it back. I went and got another one and put it on. I put a washer on first next to the standard and screwed the nut over it. That was all I did excepting to inspect the car. That was the day before the accident. I know it was. I did not hear of the accident to Mr. Vizard the day it happened, but heard of it the next morning, the 23rd, and saw the nut was off and spoke to Mr. Spalding about putting it on. There was a nut off—I cannot say whether it was the southwest corner or not. When I looked at the car I saw that the hand rail was bent and the nut was gone. When the cars arrive at a station it is the duty of the inspectors to inspect them. They are not given any thorough inspection when they go out. The train is made up and the train men go over it and couple up the air, and then go over the train when the train is coupled up ready to go and inspect the air. There were four inspectors at that time; they were Williams, Burch Spaulding and myself. I do not know where Williams and Burch are; they are not here attending Court. If the nut had been off on the morning of the 22nd or afternoon of the 21st of February, 1904, a proper inspection would have discovered it. Douglas is 26 miles from Naco. The car was inspected by me, as I have stated, at Douglas. This water car was filled with water at Douglas and taken out on the road part of the way and the w-ter used, and then on the succeeding train or some other train it was brought back empty to Douglas for the purpose of being refilled, and after that it goes out again. It is about eighteen miles from Douglas to Osborne. Osborne is between Naco and Douglas on the line of the railroad. The hand rail is a continuous piece of iron from the outer standard on one corner to the outer standard on the other, and it is held in position by a washer and a nut at each end on the outside of the standard. As I have testified, those nuts in the running of the train and rattle and necessary jar are calculated to become loose and come off. I knew that in February, 1904, and at the time I inspected the car. I have seen a great deal of switching in the yards at Douglas and I have seen a great many switchmen and brakemen get on the side of these cars and catch hold of the hand rail and ride in switching. I do not know whether it was customary. Some of them that

do it. It was from 40 to 42 inches from the ground, if the ground was level with the ties, to the side sill of the car. The side sill is 12 inches and the floor 2 inches. The stirrup hangs about 10
54 inches below the sill. The stirrup was about 10 inches below the sill on this water car. It was about 24 inches from the top of the floor to the bottom of the stirrup. The grab iron on the side of the standard would be about 3 inches from the back of the car and from 18 to 24 inches long. The bottom of the grab iron on the standard would be about 26 inches from the bottom of the stirrup. If this car were being pulled in an easterly direction and a brakeman should attempt to catch the railing and put his foot on the oil box with a train going at the rate of four miles an hour, it would not be reasonably safe for him to try to get his foot on the oil box. His foot might slip. If his foot did not slip and his hand did not slip he would be all right. There would not be any danger if he did not slip. If the hand rail pulled out he would take a tumble. His weight would drag him down. There is danger of a man's foot slipping off. If it did not slip off he would be all right, but he would be taking chances. He would be all right if he did not slip off and get hurt.

On redirect examination the witness stated:

Prior to the 21st day of February, 1904, I had seen this El Paso & Southwestern Water car No. 522 often in the transaction of my business as inspector, and it was always equipped with grab irons and stirrups at the corners as indicated in the photograph.

Made examination of this car after the accident; my instructions were to always do this when an accident happens. Cannot say which corner nut was off. I remember the car by having repaired it on the 21st in the evening.

Cross-examination:

If he got his foot on the oil or journal box and his hand hold on the iron rod, and he did not slip off the oil box, there would be no danger in riding the car in this manner. But if the hand hold pulled out of the standard he would fall.

W. J. SPAULDING, a witness for defendant, testified as follows:

That he is now foreman at Bisbee, Arizona; that during the month of February, 1904, he was car inspector at Douglas, Arizona, in the employ of the defendant. That he had followed the business
55 of car inspector up to the month of February, 1904, about six years. That he knew the water car mentioned as car No. 522 of the E. P. & S. W. The witness was here shown the photograph marked Deft's Exhibit "A," filed in this case, and said: I recognize that photograph as a correct picture of the east end of the water car as the same appeared in the month of February, 1904, and I recognize the other picture here shown me (photograph marked Deft's Exhibit "B") as the other end of the same water car No. 522. I know that the water car No. 522 E. P. & S. W. was equipped with stirrups at the corners diagonally opposite from each other in the

month of February, 1904, and I know that it was equipped with grab irons as indicated there in the photographs and with hand holds as indicated upon the photographs.

I know from my experience that in the operation of a train or in the operation of a car like the water car where there are nuts and bolts a nut is liable to work off occasionally. I saw this water car No. 522 on the morning of February 23, 1904. It then had the stirrups, hand holds and grab irons indicated in the photographs. The conductor of the train which went out the day previous and Mr. Dick, my partner, spoke to me about it. Mr. Dick was also an inspector at the time. I put a nut on the end of the hand rail on the morning of February 23rd, 1904. I put the nut on the end of the hand rail where the nut was off on the morning of the 23rd of February, 1904, at the northeast corner of the car.

Cross examined by PLAINTIFF'S COUNSEL:

The nut I put on the morning of the 23rd has been on there ever since and in constant use. It would be an unusual thing for a nut that is properly put on such a hand rail to drop off or fall off in running from Douglas to Osborne. When a car comes in it is customary to inspect it, but after a train is made up and ready to go out it is only customary to inspect the train for air. It is a frequent occurrence for switchmen and brakemen in the yards at Douglas to catch hold of the hand rail and put their foot on the journal or oil box and ride the cars out through the yards. I have seen them do that in Douglas. They do it quite a good deal.

Redirect examination:

Nuts work off in the operation of cars notwithstanding the most careful inspection. From my experience in the railroad business and in the yard, I would say that the usual and customary
56 practice respecting the matter of mounting a car that is approaching a brakeman, where a car is being pulled in an easterly direction, would be to catch the car at the grab iron and use the sill step or stirrup.

Recross examination:

It is true that a brakeman quite frequently catches anything that he gets hold of. I have seen them let the front end of the car go by them and catch the rear end.

I found the nut off on the northeast corner of car. I just screwed the nut on. It is not the duty of the inspectors to inspect the car when it goes out, except the air only; only inspect when it comes in. Don't know whether this train was inspected on the morning of 22nd. If the nut had been off on the morning of February 22nd, or evening of the 21st, 1904, I think a proper inspection would have discovered it; an ordinary inspection would have discovered this nut being off. The hand rail is a continuous piece of iron running the length of the car from outer side of end standard to outer side of end standard; the nut is put there to prevent the iron from slipping through the auger holes in the standard. I knew at this time that

the movement of the train would cause these nuts to come off. I cannot say that I did not testify in this case before that this nut was off of the southeast corner. I was not sent to repair his car; no one told me to go on the morning of February 22nd, 1904. I did not inspect this train for anything but the air. In switching cars I have frequently seen brakemen while swithing cars take hold of this iron hand rail and put their foot on the journal box and ride. I have seen them do it frequently in the yards at Douglas. They frequently let the front end pass and catch the hind end of the car.

C. A. Brown, a witness for defendant, testified as follows:

That he was trainmaster for the defendant in the month of February, 1904, and was living in Douglas, Arizona. That his duties as trainmaster were to handle equipment of the railroad and movement of trains. I knew El Paso & Southwestern water car No. 522, in the month of February, 1904. The water car was a cylinder tank, an iron tank constructed on a flat car. Witness was here shown the photographs which were introduced in evidence Def't's Exhibits "A and B" and said: I recognize these two pictures as correct
57 pictures of the two ends of this water car. I remember the water car; that water car was built under my direction. The water car was equipped as shown by these photographs. I saw the water cars in use by the company frequently. I had the distribution of all the cars at that time. The water car during all the time was equipped with these devices, hand holds, grab irons and stirrups, that are shown in the picture. It was four feet and one inch from the top of the rail to the top of the platform of that water car and it was 34 inches from the top of the platform to the hand rail that runs along the side of the car. That hand rail is put along the side of the car to keep a man from falling as he goes from one end of the car to the other; to keep a man from falling off when the car is moving. It is not designed for any other purpose. That is what they are put there for. I have had over 25 years' experience in the railroad business in the transportation department entirely. From my connection with the railroad business I know the usual and customary way of mounting a car by a brakeman as the car approaches him. If a car were being pulled by an engine in an easterly direction, the brakeman being on the engineer's or south side of the train, would catch a car as the same approached him at the front right hand corner. There is no other place where a man could get on with safety. The hand holds and grab irons and stirrups are put on the corner of the car to enable the brakeman or switchman to get on the car. I don't see how they could be put there for any other purpose. This water car 522 was brought in from Silica to Douglas on February 21st, and went out of Douglas on the morning of February 22nd on local extra west.

Cross-examination by Plaintiff's Counsel:

Conductor Silcox was in charge of the train that took this car out west on the morning of February 22nd, and dropped it at Osborne,

and Mr. R. A. Eubank was one of the brakemen that took the car out that morning. Mr. Wood and Mr. Eubank were the brakemen on that train that took the car out on the morning of February 22nd and dropped it at Osborne. I am familiar with the construction of all the cars that belong to the El Paso & Southwestern Railroad Company. I know the construction of this E. P. & S. W. water car No. 522 from personal knowledge and using the car. If I saw any car of the defendant I could tell you all about it. I think every car on the system has been in my mind more or less at times. I
58 know how all the other cars of the system are constructed as well as car No. 522.

I see no necessity of a man going on top of the car to ride a short distance; he can use his pleasure; he can get on the side and ride a short distance. He, in riding that distance, might catch hold of the hand rail and put his foot in the stirrup, or he might hold on to one of the standards in that position with one foot on the truck, and one on the step and hold to the hand hold or standard. I am not willing to swear that all of these appliances were on there on that day. I did not actually see the car on that particular day.

E. L. McAfee, a witness for the defendant, testified as follows:

My business is that of a locomotive engineer. During the month of February, 1904, I was engaged in the business of running an engine out of Douglas. I remember the occasion on which it was claimed by Mr. Vizard that he had fallen from a car. That was on the 22nd day of February, 1904, at Osborne. I was at Osborne on that day. I was running engine No. 52. On that day I picked up water car No. 522 E. P. & S. W. at Osborne. I saw the water car on that day. I remember of picking up the water car. We went in from the main line on to the coal chute track with two box cars and coupled the two box cars on to this water car, and then backed down to the coal chute and coupled the water car on to a box car and I then pulled the cars out in an easterly direction on the coal chute track to the main line. I pulled the train east. Pulling the train east the engineer's side would be the south side of my train, that is the right hand side. I know Mr. Vizard was not on the south side of that track or on the engineer's side of my train when I pulled the train out. I know that I was taking signals from the fireman and there was not anybody on my side, the engineer's side, giving signals. My side was on the south side, that is, the right hand side of the engine. If Mr. Vizard had been on the south side I would have seen him. The engineer sits on the right hand side of the locomotive, the fireman sits on the left hand side. I was taking signals from the fireman who was over on the left hand side. I was acquainted at the time with E. P. & S. W. car No. 522. As engineer I would have occasion to pick it up, and would have occasion to see
59 it. There is a valve on the end of the car and also in the end of the water tank with pipes that the engineer has got to make the connection with. There is a rubber hose and we put the hose of this pipe to the water car and also to the pipe of the en-

gine tank and tighten it up with wire. I would have to go up on this water car No. 522 E. P. & S. W. to do that. I know that this water car was equipped with a stirrup and hand holds and grab irons at that time. I was not on the water car on that particular day, but I used it frequently during the month of February, 1904, and speak of its condition from my knowledge of it acquired by my use of it.

Cross-examination by PLAINTIFF'S COUNSEL:

It is no part of my duty to examine into the appliances of a car. I did not inspect the car on the day of the accident. I only speak of the car from my general knowledge of it. I did not go upon the car on the day of the accident.

Redirect examination:

The witness was here shown the photographs marked Def't's Exhibits "A and B" and said: I recognize those two photographs as perfect pictures of the two ends of this water car E. P. & S. W. No. 522. The car was constructed with the dev es shown in the pictures.

Recross-examination:

I am not willing to swear positively that all the appliances shown in the pictures were on the car on February 22nd, 1904. I speak of the condition of the car from my knowledge of it during all the time that I was at work with it.

J. B. CARUTHERS, a witness for defendant, testified as follows:

My name is J. B. Caruthers. I was a conductor in the employ of defendant during the month of February, 1904. I have had about 18 years of experience in the train service. Stirrups, hand holds and grab irons are usually located on the front right hand corner of a car as a car is being pulled.

They are put on the car for the purpose of getting on the car. If a car was being pulled in an easterly direction a brakeman standing on the right hand side or the engineer's side of a train would usually and customarily catch the car on the front right hand corner where the stirrup and hand holds are in order to mount the same to get on the car or to ride out to a switch; that is the usual customary practice.

Cross-examination:

The stirrup and hand hold are put at the corner for the purpose of enabling the brakeman to get on top of the car. That is what I mean.

Redirect examination:

I mean if a man wished to get on top of the car or to catch hold of the car and ride out to a switch by hanging on, the stirrup and hand hold are put on the corner of the car for that purpose.

Recross-examination:

I have seen brakeman catch the hand rail of a water car such as the one mentioned in the evidence at the rear end of the car and put their foot on the journal box or oil box and ride the car out. I have done it myself. It would be more dangerous for a man to attempt to mount the car at the rear end than to mount it at the corner where the grab iron, stirrup and hand hold are. In case a man should attempt to mount the car at the corner where there is no stirrup, grab iron or hand hold, he would have nothing to hold himself in case he slipped.

The stirrup is put there for brakemen to climb on top of the car; on top, yes, that is what I mean. If a man wants to ride out to the switch he can, instead of getting on top of the car, take hold of the hand holds and hang on the side of the car. I have seen brakemen in switching hold on to the side of the car, holding to the hand hold. I have done it myself. I don't know as there is any more particular danger about it than any other way. The journal box is usually lower than the stirrup. You would be straightened out more if you put your foot on the oil box and held to the hand rail, than you would if you used the hand hold on standard and stirrup. I suppose it is just as easy to take hold of the hand rail and put your foot on the oil box as the other way. I have done it. I have seen a great many others do it. Yes, sir. If he got hold of the hand rail; I could not see any particular danger if he got a good hold.

61 A. E. CARNE, a witness for defendant, testified as follows:

I have been a railroad man about 20 years in the train service, that is, in the operation of trains. If a car were being pulled by an engine in an easterly direction the south side of the engine or train would be the engineer's side, and the brakeman being on the engineer's side, the usual and customary way of getting on a car to ride the car out to a switch five car lengths would be by using the step and hand hold at the front right hand corner of the car as the same approached him; that is the usual and customary practice.

Cross-examination:

I am not talking about any particular car, but about cars in general. I don't recollect of ever seeing the hand rail on a water car, such as that mentioned in the evidence, low enough to reach from the ground. I always avoided getting on the oil box of a car. There is more or less danger of getting on the oil box of a car and I have always avoided that as much as possible. There is a hand hold right where the stirrup is, just above it. Railroad brakemen catch at the most convenient place. I dont' think it would be the most convenient to catch the hand rail and put your foot on the oil box, and that would not be the usual and customary way in which they do the work. There is not any protection for your foot on the oil box. It is usually more or less slippery from oil.

When I speak of using the stirrup I am talking of getting on top of the car. If a man could get a good hold it is just as safe to catch

hold of the hand rail and put your foot on the oil box. If the brakeman could reach the hand rail conveniently I would not consider it dangerous to take hold of the hand rail and put your foot on the journal: to ride, as shown me, by the stirrup and hand hold on the standard you would be in a jack-knife position.

C. G. CORNELIUS, a witness for defendant, testified as follows:

I am a railroad man. Have been in the railroad service for 21 years as conductor and brakeman in different places. Have had about seven years' experience in this southwestern country. The right hand side of a train is the engineer's side and is the side on which brakemen do their work. If a brakeman were standing on the right hand side of a train which was being pulled east,
62 and had occasion to mount a water car or hang upon the side of the car to ride the same out it would be usual and customary for him to catch the car at the front right hand corner of the same where the hand holds are. The hand holds are put there for that purpose, to enable a man to hang on the side of the car and ride the same out or to get up on the car.

Cross-examination:

Brakeman often reach up and take hold of the hand rail and put their foot on a journal box or oil box and hang there to ride out. They do it a great deal. I myself have done it. That rail was not put there to get on the cars. I have caught the hand rail and put my foot on the oil box and I have seen others do it. I never got hurt, but I have seen other men get hurt.

Redirect examination:

From my experience I would say that it would be more dangerous for a man to attempt to catch the car at the rear end where there was no hand hold and no stirrup than it would be to catch the car at the front right hand corner where there was a stirrup and hand hold.

Cross-examination:

Brakemen often reach up and take hold of hand rail and put the foot on oil box. I could not say as to custom. It is done a great deal, done frequently. I have done it. No particular danger. A car like that if you take hold of the hand hold on the standard and out [put] your foot in stirrup you would be in a cramped position; yes, you would be cramped more in this way than the other.

C. L. HOY, witness for defendant, testified as follows:

I have had 23½ years' experience in the train service. Have had about 19 years' experience in this southwestern country. The right hand side of a train is the engineer's side and is the side on which a brakeman does his work. If a car were being pulled in an easterly direction and a brakeman on the south side of the train had occasion to mount the water car and ride the same out to a switch, the

usual and customary way for him to mount the car or hang on the side of the same and ride the car out, would be by grabbing
63 the hand hold and putting his foot in the stirrup at the front right hand corner of the car; that is the proper way to do it. Those devices are out on the corner of the car for that purpose.

Cross-examination:

As I have said, I have caught the hand rail and put my foot on the oil box to ride a car, but that is not the way to do it. There is some danger about all oil boxes, that is the journal box. If there is oil there the chances are that a brakeman would slip off. If a man were not tall enough and made a grab at it and missed it he would fall.

Q. We are talking about a car where the brakeman can reach it or did reach it and got his foot on the oil box; I want you to tell the jury what danger that man is in riding out four or five car lengths?

A. Well, I don't know as he is in any danger.

Q. Isn't it an absolutely safe place to ride as far as railroading is safe?

A. Well, I have rode there lots of times.

Q. You have seen thousands of other men ride there?

A. Yes, sir.

Q. They do it every day?

A. Well, I don't know, the way the water cars are constructed now days——

Q. At the time you did it you have seen thousands of other men doing it in the same way?

A. Yes, sir.

Q. It was done every day by these men?

A. Yes, sir.

Q. On all railroads in the United States that you have worked for?

A. How is that?

Q. On all railroads in the United States so far as you know you have seen it done?

A. Yes, sir; I have seen it done.

W. G. Rowe, a witness for defendant, testified as follows:

That he is terminal trainmaster of the El Paso & Southwestern. Has had about ten years' experience in the train service handling and operating trains and cars. If a car were being pulled in an easterly direction by an engine the right hand side of the train would be the engineer's side, and would be the side on which a
64 brakeman would work, and if the car were being pulled as stated it would be usual and customary for a brakeman desiring to catch a car and hang on to the same and ride out to the switch to catch the car at the front right hand corner where the stirrup and hand hold are. To catch the hand hold and put his foot in the stirrup. That is the usual and customary way of mounting the same.

Cross-examination:

Where a hand rail is low enough for a brakeman to get hold of it I have seen brakemen catch the hand rail and out [put] their foot on the journal box, but this is not the right way to mount a car under circumstances mentioned. The safest way to mount the car is at the corner of the same where the hand hold and stirrup are. The hand hold and stirrup are put there for that purpose. If the iron rail was low enough so a man could reach up and catch it and put his foot on oil box, I don't know that there would be any particular danger. I have seen them put their foot on oil box and reach and catch this hand rail on water cars. I have seen them do it instead of putting their foot in stirrup. If they got a good hold I don't see of the danger of it in taking hold of this rail and putting the foot on the oil box and riding, going 4 or 5 miles per hour.

Q. You don't see any danger is [if] a man has caught on a car that way?

A. No, I don't see the danger of it.

The defendant here introduced in evidence the plaintiff's original petition, which was filed in the District Court of El Paso County, Texas, in this cause (which was removed from the State Court) on the 13th day of April, 1904. There is no allegation or intimation in said original petition of the fact that the water car was not properly equipped with hand holds and grab irons and stirrups.

The defendant also introduced the plaintiff's original petition which was filed in the United States Circuit Court in case No. 377 of H. D. Vizard *vs.* The El Paso & Southwestern Railroad Company, on March 8, 1904, based upon the accident complained of in this case, in a case which was dismissed out of that Court, and in said original petition there is no allegation or intimation whatever to the effect that this E. P. & S. W. water car No. 522 was not properly equipped with stirrups, hand holds and grab irons.

65 The defendant also introduced the plaintiff's first amended original petition, which was filed in said case No. 377, U. S. Circuit Court, above mentioned, on the 9th day of April, 1904, and in said amended original petition there is no allegation or intimation to the effect that the water car was not properly equipped with hand holds, grab irons and stirrups.

Here the defendant rested.

A. C. ATHERTON, witness for plaintiff, testified as follows:

I have had 20 years' experience in the railroad business as brakeman running trains, switchman and yard master. If a car were being pulled east by an engine, the brakeman being on the right hand or engineer's side of the train, if he desired to mount a water car with a hand railing, would usually and customarily catch the hand railing and put his foot on the truck and oil box to ride the car out. If he did not want to get on top of the car he would catch hold of the hand rail and put his foot on the oil box or journal and ride out. I never saw a water car with a hand hold on the

standard at the right hand corner, and I have had 20 years' experience. The step is put there to get on the car by when you wish to mount on top of the car.

Cross-examination:

The steps and hand holds are put there for use to get on the car. I suppose they are put there for the purpose of enabling a man also to hang on to the car if he wants to ride out four or five car lengths. The devices on the front or right hand corner of the car are put there to get on the car with, and to hang on the car with.

R. H. GLENN, a witness for plaintiff, testified as follows:

I have been employed by the defendant. I was discharged about the 12th of March. I have had about 16 or 18 years' experience in the railroad service. I don't believe I ever saw a water car on the El Paso & Southwestern with a hand hold on a standard as shown on the photograph introduced in evidence. I don't remember of ever seeing one. The customary way of mounting a water car, such as the one mentioned in the evidence, by a brakeman on
66 the engineer's side of the train as the car was being pulled east, would be to catch the hand rail and put his foot on the oil box or journal box.

Cross-examination:

I was discharged by the defendant for being absent without permission.

Q. Will you tell this jury that the standards of these water cars and that water car No. 522 have not had that hand hold on the side of the standard for years?

A. I don't know as I ever seen water car No. 522.

Q. I didn't ask you that. I want to know if you will tell this jury that they haven't had that hand hold——.

A. I didn't say that; I said I never noticed them.

Q. You will not say they haven't had them?

A. I said if they did I never noticed them.

COURT: You know whether this car had them or not?

WITNESS: I don't know as I ever remember seeing that car?

COURT: Well, you don't know anything about that car?

The WITNESS: I don't know as I ever saw the car.

W. D. FOTH, a witness for plaintiff, testified as follows:

I have been employed by the El Paso & Southwestern Railroad in the capacity of fireman. I am familiar with the manner and way in which brakeman and conductors and switchmen do their work in riding cars out. If a water car such as mentioned in the evidence were being pulled in an easterly direction, a brakeman being on the right hand or engineer's side of the train, would usually and customarily, if he desired to mount the car and ride the same out, catch the hand rail and put his foot on the truck or on the box of the journal.

67 Cross-examination:

I have a suit against the defendant. I am not in its employ at the present time.

The witness was here shown the pictures of the water car introduced in evidence (Def't's Exhibits "A and B").

Q. We will say, Mr. Foth, that that is a picture of the water car that we are talking about, No. 522, E. P. & S. W.; you see the hand hold on the standard here?

A. Yes, sir.

Q. And the grab iron?

A. Yes, sir; I see it there.

Q. You see that stirrup?

A. Yes, sir.

Q. We will say that that is the front right hand corner of the car as that car is coming east; say the table is the car and the car is being pulled by the engine east; now I want to know what that stirrup and what those hand holds are put on the car for?

A. I expect they are put on there for to use.

Q. You know what they are put on there for?

A. That is out of my line of work. I guess, though, they are put there for to use when they are riding the cars.

Q. When they mount the car?

A. Yes, sir; I don't suppose they would be put there for ornament.

The witness stated further on cross examination that the usual and customary way of brakemen to mount a car being pulled in an easterly direction would be to grab the hand rail as the car passed and put his foot on the journal or oil box. That he had seen brakemen do it often and that notwithstanding the fact that the stirrup and hand hold are put at the front right hand corner for the men's use the customary and usual practice was not to use them.

At the conclusion of the foregoing evidence and while the jury were still in the box, the defendant asked the Court to charge the jury to find a verdict for defendant, and give the jury the following special charge No. 1 (omitting the style and number of the case):

Special Chg. No. 1.

"GENTLEMEN OF THE JURY: You are instructed in this case to return a verdict for the defendant."

68 Which said peremptory charge (special charge No. 1) requested by the defendant, was refused by the Court, and the Court indorsed upon the same the following language:

"Refused; but the Court is in doubt as to the correctness of its ruling.

(Signed) T. S. MAXEY, *Judge.*"

And to the action of the Court in refusing said peremptory charge requested by the defendant the defendant by its counsel in open Court excepted; said special charge No. 1 being asked upon the

ground that the evidence shows (1) by a great preponderance and conclusively that the water car mentioned in the plaintiff's petition and in the evidence was equipped at the front right hand corner of the same with hand holds, grab irons, and a stirrup for plaintiff's use, and that plaintiff, if he attempted to mount the water car mentioned in the evidence (as he testified he did) did so at a place and in a manner that was negligence on his part; (2) and that plaintiff attempted to mount the water car in an unnecessarily dangerous way and in an unusually dangerous place, and plaintiff, if injured at all, was injured through a risk assumed by him in not using the appliances which defendant had provided for his use.

Thereupon, after refusing the said peremptory charge asked by the defendant, the Court gave the jury the following general charge (omitting caption):

General Charge.

"GENTLEMEN OF THE JURY:

The plaintiff has brought suit to recover damages of the defendant because of injuries which he claims to have sustained while in the employment of the defendant as a brakeman. The plaintiff claims that he was injured while in the attempt to discharge his usual and ordinary duties in Arizona. The controversy in question arises in reference to a car called a water car, No. 522, and the testimony shows that there were placed on each side of the water car a certain number of upright standards; in the upper ends of the standards auger holes were bored, and through these holes an iron rod, approximately the length of the car, was inserted, thus making a convenient railing for the use of the employés. The plaintiff further claims that the iron rod, or what he terms hand railing or hand hold, was not fastened at one of its ends with a nut. He further insists that in attempting to catch hold of this iron rod or hand rail-
69 ing, on account of the failure of the defendant to have a nut screwed on the end of the rod, the rod slipped out of its position, and the plaintiff fell to the ground and was injured.

The plaintiff in his petition, attributing his injuries to the negligence of the defendant, it was incumbent upon him to establish, by a preponderance of the evidence, the truth of the charge he prefers, for if he was not injured as a direct result of the negligence of the defendant, he is not entitled to recover. What, then, is negligence? It is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essense of the fault may lie in omission or commission. The duty is dicated and measured by the exigencies of the occasion. See 95 U. S., 441, 442.

In reference to the duty of a railroad company, or master, to employés, the law requires the company to exercise reasonable care in furnishing suitable machinery and appliances for carrying on the business for which it employs the servant, and in keeping such ma-

chinery and appliances in repair, including the duty of making inspections, tests and examinations at proper intervals, but the master is not responsible for hidden defects which could not have been discovered by a careful inspection. The duty of the railroad company in that respect to its employés is discharged when, and only when, its agents, whose business it is to supply such instrumentalities, exercise reasonable care as well in their purchase originally, as in keeping and maintaining them in their original condition, so as to be reasonably and adequately safe for use by employés. A master employing a servant impliedly engages with him that the place in which he is to work, and the tools, or machinery and appliances with and about which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools, appliances and machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, appliances and machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something that is inherent in the thing itself—it is a matter of necessity and cannot be obviated. And within such limitations, the master who provides the place, the tools, appliances and machinery, owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of the guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has the right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects. Union Pacific Railway Co. *vs.* Daniels, 152 U. S. 688, 689, 690.

As already stated, it is a well recognized principal that it is the duty of the employer to exercise reasonable care to furnish sufficient and safe tools, machinery and other appliances, or other means by which the service is to be performed, and he is required to exercise reasonable care to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur risks arising * * * from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. Railroad Co. *vs.* Herbert, 116, U. S., 647, 648. The plaintiff, therefore, when he entered the service of the defendant, did not by virtue of his contract of employment assume any risk incidental to the use of defective appliances or machinery, of which defects he was ignorant; and it was the duty of the defendant in employing the plaintiff as a brakeman to use reasonable care in providing its cars with safe and suitable tools

and appliances to be used by him. Whether the car about which the plaintiff was working at the time he was hurt was provided with safe and sufficient hand hold or hand railing, is a question of fact which you must determine for yourselves from a consideration of the testimony. The mere fact that the defendant had in its employment competent car inspectors would not, of itself, exonerate it from liability if the hand railing was defective in construction, or not in proper repair; for inspectors were the representatives of defendant, and if they failed to exercise due and reasonable care in inspecting the car, including the hand railing in question and keeping the same in proper repair, then for any negligence on their part in that respect, from which injury resulted to the plaintiff, the defendant would be liable. See 116 U. S., 648. Hence it follows from what has been said that it was the duty of the defendant, when it engaged
71 the services of the plaintiff, to use reasonable care to provide him with safe and sound appliances on the car about which it was his duty to perform work; and the defendant was required to exercise the same degree of care in keeping the car and other appliances in proper repair.

One of the principal questions for you to determine is: Whether the plaintiff was injured, as he claims, while in the discharge of his duty by the giving away of a hand railing or hand hold as he terms it, because of the want of a nut on the end thereof. If the plaintiff was injured as alleged by him, then you will ascertain from the evidence in the case whether the hand railing was defective in the respect claimed by plaintiff. If the hand railing was in good order or condition, and was suitable for the purpose for which it was intended, then the plaintiff cannot recover in this case, although he may have received injuries while endeavoring to use it. And you are further instructed that if the car inspectors of the defendant used reasonable care at proper intervals to inspect the hand railing, and made all such repairs as were necessary in connection therewith at such proper intervals, the intervals to be determined by you from a consideration of all the testimony, then the defendant would not be liable to the plaintiff for any injury which he may have received; although in point of fact there was no nut on the railing at the time he was hurt, if, indeed, you find that he was hurt in attempting to catch hold of the hand railing. If, however, you conclude from a consideration of the testimony that the hand railing was defective, then you will determine whether the defendant, through its agents and servants, could have ascertained the defective condition of the same by the exercise of reasonbale care and diligence. If, by the exercise of such care and diligence, the defendant could have ascertained the defective condition of the hand railing and failed to do so, then it would be liable in damages to the plaintiff, if he was hurt as alleged by him, unless you find from the testimony that the plaintiff himself knew of such defective condition of the hand railing. If the plaintiff knew that the hand railing was defective and, notwithstanding such knowledge, he attempted to catch hold of the same and was hurt, then he would not be in a position to recover.

You are further instructed that the law required the plaintiff to take reasonable care of himself in order to avoid injuries.

In this connection it is insisted by the defendant that car No. 522 was supplied and equipped with proper hand holes, grab irons and stirrups, and other necessary appliances and that such appli-
72 ances were placed on the car for use by its employés in the discharge of their respective duties. The defendant maintains that it was the duty of the plaintiff and all other employés to use such appliances, and not to take unnecessary risks in attempting to hold on to the car at other places while discharging their duties. As before stated, the law requires a man to look out for his own safety, and if he fails to exercise that degree of care which a person of ordinary prudence would have exercised under similar circumstances, and if by such failure he contributes to his own injuries, he cannot recover. If, therefore, you find from a consideration of all the facts and circumstances in evidence that the plaintiff failed to exercise that degree of care which a person of ordinary prudence would have exercised under similar circumstances, in attempting to catch hold of the hand railing, and if thereby he contributed to his injuries, he cannot recover, and your verdict in that event should be in favor of the defendant. And you are further instructed that if the plaintiff, in any other respect, was guilty of negligence which contributed to his injuries, your verdict should be for the defendant.

If, then, upon consideration of all the facts and circumstances in evidence, you believe that the plaintiff was injured in the manner alleged by him, and that the hand railing in question was defective because of a want of a nut at the end thereof; and if you further believe that the plaintiff at the time in question was in the exercise of reasonable and ordinary care, and not guilty of any negligence which contributed to his injuries, and further that he was injured because of a defective condition of the hand railing as claimed by him, then it would be your duty to find a verdict in his favor, unless you find from a consideration of the testimony that the defendant's car inspectors performed their duty in reference to inspecting and repairing the hand railing as above set forth in this charge, in which last named event your verdict should be for the defendant; that is to say, if the car inspectors exercised reasonable care in inspecting and repairing the car in question, including the hand railing, at proper intervals, your verdict should be in favor of the defendant.

You are the exclusive judges of the credibility of the witnesses and of the weight to be attached to their testimony, and you will give it such weight as you deem it entitled to receive under all the circumstances of the case. The burden of proof is upon the plaintiff to show by a preponderance of the evidence the negligence of the defendant, and so the burden is upon the defendant to show by a preponderance of the evidence that the plaintiff was guilty of contributory negligence.

73 If, in view of the evidence and instructions of the Court, your verdict be in favor of the plaintiff, you will award him such an amount of actual damages as will compensate him for the injuries he has sustained; and in arriving at that sum you will take

into consideration the character of his injuries, whether permanent or otherwise, and his diminished capacity, if any, to earn money in consequence of such injury, as well as for the pain and suffering he may have endured, or will endure in consequence of the same; and, in this connection you will also consider the reasonable expense of medical attention which he has incurred and for which he is liable on account of his injuries.

If your verdict be in favor of the plaintiff, you will return it in the following form: 'We, the jury, find for the plaintiff and assess his damaged [damages] at $——,' you to fill up the blank with the amount awarded. If, however, your verdict be for the defendant, you will simply say, 'We, the jury, find for the defendant.'

(Signed) T. S. MAXEY, *Judge.*

And also gave the jury the following special charge requested by counsel for plaintiff (omitting caption):

"Gentlemen of the Jury: At the request of the plaintiff you are further instructed that if you should find and believe from the evidence before you in this case that the plaintiff attempted to mount the rear of said water car by the use of the hand rail and by placing his foot on the journal box or oil box, instead of mounting the front end of the car by the use of the stirrup and hand hold on the standard, and you should further find that in so doing he was in the exercise of due care for his own safety and was doing his work and mounting the car in the usual and customary manner and way in which brakemen usually and customarily mount such cars, and that in mounting said car in the manner and way in which he did attempt to mount same, at the time of said accident, he was not guilty of negligence, as that term has been defined to you in the main charge, then you are instructed that he would not be guilty of contributory negligence.

(Signed) PATTERSON & WALLACE,
Attorneys for Plaintiff.

Given:
T. S. MAXEY, *Judge.*

And thereupon, while the jury was still in the box, the defendant by its counsel asked the following special charge (omitting caption) No. 3:

"The defendant asks the Court to charge the jury as fol-
74 lows: If the jury believe from the evidence in this case, that water car No. 522, was equipped at the time of the accident mentioned in the evidence, with grab irons, hand holds and a stirrup on the front right hand corner of the same, and that the plaintiff attempted to mount the car as he testifies he did at the rear corner of the right side of said water car, as the same was being pulled in an easterly direction where there was no stirrup or grab iron, you are instructed to return a verdict in this case in favor of the defendant, and you are further instructed, that upon this issue the burden of proof is upon the plaintiff and he is required to establish the fact by a preponderance of the evidence that the car was not equipped at

the right hand front corner of the same as the car approached him with grab irons or hand holds.

(Signed) PATTERSON, BUCKLER & WOODSON,
Attorneys for Defendant.

Refused:
T. S. MAXEY, *Judge.*

Which said special charge No. 3, was refused by the Court, and to the Court's action in refusing same the defendant by its counsel in open Court excepted upon the ground that if the facts stated in the same were found by the jury to be true the plaintiff was not entitled to recover.

And defendant also asked the Court to instruct the jury by special charge No. 4 (omitting caption), as follows:

"If you believe from the evidence that ordinary care was exercised by the inspector or inspectors of defendant in the inspection of the water car mentioned in the evidence before the same left Douglas, Arizona, and that notwithstanding the fact that such ordinary care was exercised by said inspector or inspectors, the water car mentioned in the evidence was allowed to leave Douglas without a nut on the end of the hand rail mentioned in the evidence, you are instructed to find a verdict in favor of the defendant;" which said special charge No. 4 was refused by the Court, and to its action in refusing the same, the defendant in open Court excepted, upon the ground that if the facts stated in the same were found by the jury to be true, the plaintiff was not entitled to recover.

And the defendant also requested the Court to give the
75 jury special charge No. 5, which was as follows: (omitting caption):

"You are charged in this case that the defendant, the El Paso & Southwestern Railway Company, was only called upon at the time of the alleged injury to the plaintiff, to exercise ordinary care in the selection of its car inspectors, and only called upon to exercise ordinary care through such inspectors in so far as the inspection of the water car mentioned in the evidence was concerned, and if you believe that on the afternoon of February 21, 1904, or before the water car left Douglas, on the morning of February 22, 1904, that said water car was inspected by the inspector of said defendant, and that its inspector exercised ordinary care in the inspection of the same, and notwithstanding the exercise of such ordinary care, failed to discover the absence of the nut from the end of the hand hail mentioned in the evidence, (if you believe that the nut was missing from the hand rail at the time the water car left Douglas on the morning of February 22nd, 1904), you will return a verdict in this case in favor of the defendant."

Which said special charge No. 5, was refused by the Court, and to the Court's action in refusing same, the defendant, by its counsel in open Court excepted upon the ground that if the jury believed the facts therein stated, the plaintiff was not entitled to recover.

And the defendant also requested the Court to give the jury special charge No. 6, which was as follows, (omitting caption):

"If you believe from the evidence that the nut was off of the end of the hand rail mentioned in the evidence at Douglas, before the water car mentioned in the evidence left Douglas, and you are able to determine from the evidence when the said nut got off of the end of said hand rail, and you believe from the evidence that the absence of the said nut was first discovered by the witness Eubank, and you believe that ordinary care had been exercised by the inspector or inspectors of the defendant at Douglas in the inspection of said water car, and notwithstanding such inspection, the absence of the nut (if it was absent) was not discovered, and you believe that Eubank did not report the absence of said nut after he discovered the absence of said nut, you will find a verdict in favor of the defendant."

Which said special charge No. 6, was by the Court refused, and to its action in refusing the same, the defendant in open Court excepted upon the ground that if the jury believed the facts
76 stated in said special charge No. 6, the plaintiff was not entitled to recover.

And defendant, by its counsel, also requested the Court to give the jury special charge No. 7, (while the jury was still in the box), said special charge No. 7, being as follows, (omitting caption):

"If the jury believe from the evidence that there were hand holds or grab irons and a stirrup at the front right hand corner of the water car when the plaintiff attempted to mount the same and plaintiff failed to use the same, and attempted to mount the car at the rear right hand corner, you will find a verdict for the defendant."

And the Court having refused to give special charge No. 7, the defendant in open Court, by its counsel, excepted upon the ground that if the jury should believe the facts stated in said special charge No. 7, the plaintiff was not entitled to recover.

And at the request of defendant's counsel, all of said six exceptions were duly noted and this bill of exceptions has been prepared and filed accordingly.

And upon the trial of said cause, after the special charges or instructions hereinbefore mentioned, asked by defendant's counsel, were refused by the Court, defendant's counsel, still insisting upon same, the Court gave the jury the following special charges:

No. 8. "If you believe from the evidence in this case that the nut mentioned in the evidence was upon the end of the hand rail mentioned in the evidence which the plaintiff claims gave way, and allowed him to fall, at the time the water car mentioned in the evidence left Douglas, on the morning of February 22nd, 1904, and that said nut in some way became loose and came off of the end of said hand rail before the plaintiff attempted to use the same, at the time mentioned in the evidence at Osborne, Arizona, and if you believe that the coming loose or working loose of a nut situated as said nut was under the circumstances, was one of the ordinary risks of the business in which plaintiff was engaged, you will find in favor of the defendant."

No. 9. "If you believe from the evidence in this case that the plaintiff H. D. Vizard, attempted to mount the water car mentioned

in the evidence on the north or left side of the same as the same approached him on the occasion of his alleged injury, as he him-
77 self has testified that it would have been wrong and improper for him to have attempted to mount said car on the north or left side of same as the same approached him, and you believe from the evidence that such an act upon his part would have been negligence, you are instructed if you so believe, to return a verdict in favor of the defendant."

No. 10. "Before you can find in favor of the plaintiff in this case, you must believe from a preponderance of the evidence that the diseased condition *in* which the plaintiff claims in his petition, and about which he has introduced evidence, resulted from the cause mentioned in his petition and not from any other causes."

No. 11. "You are not authorized to find a verdict against the defendant simply on account of the fact that an accident happened to him while in defendant's employ, but you must believe from a preponderance of the evidence that he was injured (if he was injured) through the negligence of the defendant, and that he (plaintiff) was not guilty of contributory negligence and that he was not injured through an ordinary risk incident to the business in which he was engaged."

No. 12. "If you believe from the evidence in this case that as the water car mentioned in the evidence was being pulled out of the yard of Osborne, Arizona, the plaintiff attempted to mount the same by catching hold of the rear end of the hand rail mentioned in the evidence, and that under the circumstances a reasonably prudent man would not have attempted to catch the hand rail where he caught it, or in the manner in which he caught it, you will find in favor of the defendant."

No. 13. "If you believe from the evidence in this case that the plaintiff could have caught hold of the engine mentioned in the evidence, or the front right hand corner of either of the two box cars behind the same, or the front right hand corner of the water car mentioned in the evidence, or the rear box car as the same approached him, and that an ordinarily prudent person situated as he was, would have so gotten a position upon one of the cars mentioned in the evidence, and that by so doing, the plaintiff would not have placed himself in a position of unusual danger, and you believe from the evidence that the plaintiff attempted to catch and did catch the railing at the rear end of the water car while the same was in motion,
78 and attempted at the same time to hold himself by the use of the rear end of said hand rail, and by placing his foot upon a journal box, or some part of the rigging at the rear end of said water car, and that the plaintiff in so doing, placed himself in an unusually dangerous position, or assumed an unnecessary risk, you are instructed in this case to find a verdict in favor of the defendant."

The foregoing bill of exceptions is signed this 11th of June, A. D. 1906, with the statement that the defendant did not reserve exceptions either to the general charge of the Court, or to the special instruction given at the request of the plaintiff.

T. S. MAXEY, *Judge.*

(Indorsed:) No. 424. In the U. S. Cir. Ct. W. D. T. at El Paso, Texas. H. D. Vizard, Pl'ff., *vs.* El Paso & Southwestern Railroad Co. Def't's Bill of Exceptions. Filed June 11th, 1906. D. H. Hart, Clerk.

Petition for Writ of Error.

Filed June 16, 1906.

In the Circuit Court of the United States for the Western District of Texas, at El Paso, Texas.

At Law. No. 424.

H. D. VIZARD
vs.
EL PASO & SOUTHWESTERN RAILWAY COMPANY.

And now comes the El Paso & Southwestern Railway Company, defendant in the above styled cause, and says:

That on or about the 13th day of April, 1906, this Court entered judgment herein in favor of the plaintiff and against this defendant in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Fifth Circuit for the correction of the errors so complained of, and
79 that a transcript of the record and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

MILLARD PATTERSON,
J. A. BUCKLER,
J. F. WOODSON,
Attorneys for the El Paso & Southwestern Railway Co.

Granted this the 16th day of June, 1906, and the amount of the writ of error and supersedeas bond fixed at $15,000.00.

T. S. MAXEY, *Judge.*

(Indorsed:) No. 424. In the U. S. Cir. Ct. W. D. T. at El Paso, Texas. H. D. Vizard, *vs.* El Paso & Southwestern Railway Co. Petition for Writ of Error by El Paso & Southwestern Railway Company. Filed June 16th, 1906. D. H. Hart, Clerk; by Geo. B. Oliver, Deputy.

Bond for Writ of Error.

Filed June 16, 1906.

Know all men by these presents, That we, The El Paso & Southwestern Railway Company, as principal, and J. F. Williams and John A. Happer, as sureties, are held and firmly bound unto H. D. Vizard in the full and just sum of fifteen thousand dollars, to be paid to said H. D. Vizard, his attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this —— day of June, in the year of our Lord, one thousand, nine hundred and six.

Whereas, lately, at a term of the U. S. Circuit Court, W. D. T. at El Paso, Texas (April term, 1906) in a suit depending in said Court between H. D. Vizard, *versus* The El Paso & Southwestern Railway Company, No. 424, on the Docket of said Court, a judgment was rendered against said El Paso & Southwestern Railway Company on the 13th day of April, 1906, for the sum of $9,000.00, which said judgment was on said date reduced by remittitur required by the Court, to the sum of six thousand dollars, as by the record
80 is manifest said judgment now being in force for the sum of six thousand dollars, and the said El Paso & Southwestern Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court, to reserve the judgment in the aforesaid suit, and a citation directed to the said H. D. Vizard (and his attorneys on record) citing and admonishing him to be and appear before the United States Court of Appeals for the Fifth Circuit to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, the condition of the above obligation is such that if the said El Paso & Southwestern Railway Company shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE EL PASO & SOUTHWESTERN RAILWAY CO.,
By MILLARD PATTERSON,
Its Att'y & Agent.

J. F. WILLIAMS.
JOHN A. HAPPER.

Sealed and delivered in the presence of

——— ———.

Approved this the 16th day of June, 1906.

T. S. MAXEY,
United States Judge.

UNITED STATES OF AMERICA,
Western District of Texas, County of El Paso:

I, J. F. Williams, do solemnly swear that I am worth in my own right at least the sum of $15,000.00, after deducting from my property all that which is exempt by the Constitution and laws of the State from forced sale, after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances upon my property which are known to me; that I reside in El Paso, El Paso County, Texas, and have property in this state liable to execution, worth $15,000.00 and more.

J. F. WILLIAMS.

Subscribed and sworn to before me this 13th day of June, 1906.

[SEAL.] MIKE FERRELL,
Notary Public, El Paso County, Texas.

81 UNITED STATES OF AMERICA,
Western District of Texas, County of El Paso:

I, John A. Happer, do solemnly swear that I am worth in my own right, at least the sum of $15,000.00, after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances upon my property which are known to me; and that I reside in El Paso, El Paso County, Texas, and have property in this state liable to execution worth $15,000.00 and more.

JOHN A. HAPPER.

Subscribed and sworn to before me this 13th day of June, 1906.

[SEAL.] MIKE FERRELL,
Notary Public, El Paso County, Texas.

THE STATE OF TEXAS,
County of El Paso, Western District of Texas:

I, do hereby certify that the sureties above mentioned, J. F. Williams and John A. Happer, are good and sufficient for the sum of fifteen thousand dollars, and I approve the foregoing bond.

D. H. HART,
Clerk U. S. Circuit Court, W. D. T. at El Paso, Texas,
By GEO. B. OLIVER, *Deputy.*

(Indorsed:) No. 424. In the Cir. Ct. W. D. T. at El Paso, Texas. H. D. Vizard, *vs.* El Paso & Southwestern Railway Co. Bond for Writ of Error filed by El Paso & Southwestern Railway Co. Filed June 16th, 1906. D. H. Hart, Clerk; by Geo. B. Oliver, Deputy.

82 *Assignment of Errors.*

Filed June 16, 1906.

In the Circuit Court of the United States for the Western District of Texas, at El Paso, Texas.

No. 424. At Law.

H. D. VIZARD, Plaintiff,
vs.
EL PASO & SOUTHWESTERN RAILROAD COMPANY, Defendant.

Assignment of Errors.

The El Paso & Southwestern Railway Company, the defendant in the above styled cause, in connection with its petition for writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, to-wit:

First.

The trial Court erred in refusing to charge the jury to find a verdict for the defendant as requested by the defendant's special charge No. 1, as the evidence showed by a great preponderence and conclusively that the water car mentioned in the plaintiff's petition, and the evidence from which he alleges he fell, was equipped at the front right hand corner of same with hand holds, grab irons and a stirrup for plaintiff's use, and that plaintiff, if he attempted to mount the water car mentioned in the evidence as he testified he did at the southwest corner of the same, did so at a place and in a manner that was negligence on his part.

Second.

The Trial Court erred in refusing to charge the jury to find a verdict for defendant as requested in defendant's special charge No. 1, as the evidence showed by a great preponderence and conclusively that the plaintiff attempted to mount the water car mentioned in the evidence and in his petition in an unnecessarily dangerous way and in an unusually dangerous way, and if injured at all, he was injured through a risk assumed by him in not using the appliances required by law which defendant had provided for his use.

83 Third.

The Trial Court erred in refusing to give the jury defendant's special charge No. 3, which was to the effect that if the jury believed from the evidence in the case that the water car No. 522 was equipped at the time of the accident mentioned in the evidence with grab irons, hand holds and a stirrup on the front right corner of the same, and that the plaintiff attempted to mount the car as he testi-

fied he did, at the rear corner of the right side of the said water car, as the same was being pulled in an easterly direction where there was no stirrup or grab iron, then they should return a verdict in favor of the defendant, and that upon this issue the burden of proof was upon the plaintiff, and it was incumbent upon him to establish the fact by a preponderance of the evidence that the water car was not equipped at the right hand front corner of the same as the car approached him with grab irons or hand holds." If the facts stated in the special charge No. 3, were found by the jury to be true, and it being shown by the great preponderance of the evidence that they were true, the plaintiff was not entitled to recover.

Fourth.

The Trial Court erred in refusing to give the special charge No. 4, requested by the defendant, which was to the effect; "That if the jury believed from the evidence that ordinary care was exercised by the inspector or inspectors of defendant in the inspection of the water car mentioned in the evidence, before the same left Douglas, Arizona, and that, notwithstanding the fact that such ordinary care was exercised by said inspector or inspectors, the water car mentioned in the evidence was allowed to leave Douglas without a nut on the end of the hand rail mentioned in the evidence, the jury should find a verdict in favor of the defendant." If the facts stated in said special charge No. 4 were found by the jury to be true, and the evidence fully justified them in so finding, the plaintiff was not entitled to recover.

Fifth.

The Trial Court erred in refusing to give the jury special charge No. 5, requested by the defendant, which was to the effect: "That the defendant was only called upon at the time of the alleged injury to exercise ordinary care in the selection of its car inspectors
84 and only called upon to exercise ordinary care through such inspectors in so far as the inspection of the water car mentioned in the evidence was concerned, and that if the jury believed that on the afternoon of February 21, 1904, or before the water car left Douglas on the morning of February 22, 1904, that said water car was inspected by the inspectors of said defendant, and that its inspectors exercised ordinary care in the inspection of the same, and notwithstanding the exercise of such ordinary care failed to discover the absence of the nut from the end of the hand rail mentioned in the evidence (if the jury believed that the nut was missing from the hand rail at the time the water car left Douglas on the morning of February 22nd, 1904), then the plaintiff was not entitled to recover."

If the jury believed the facts stated in special charges No. 5, and there was evidence fully justifying the jury in finding such fact, the plaintiff was not entitled to recover.

Sixth.

The Trial Court erred in refusing to give the jury special charge No. 6, requested by the defendant, which was to the effect: "That if the jury believed from the evidence that the nut was off of the end of the hand rail mentioned in the evidence at Douglas, and they were unable to determine from the evidence when the nut got off of the end of the hand rail, and they believed from the evidence that the absence of the nut was first discovered by the witness Eubank, and they believe that ordinary care had been exercised by the inspector or inspectors of the defendant at Douglas, in the inspection of the water car, and that, notwithstanding such inspection the absence of the nut (if it was absent) was not discovered, and they believed that Eubank did not report the absence of said nut after he discovered the absence of said nut, then they should find a verdict in favor of the defendant. If the jury believed the facts stated in said special charge No. 6, as there was evidence fully justifying them in so believing, the plaintiff was not entitled to recover.

Seventh.

The Trial Court erred in refusing to give the jury special charge No. 7, requested by the defendant, which was to the effect: "That if the jury believed from the evidence that there were hand holds or grab irons and a stirrup at the front right hand corner of
85 the water car, when the plaintiff attempted to mount the same, and plaintiff failed to use the same, and attempted to mount the car at the rear right hand corner of the same, then they should find a verdict for the defendant. It was shown by a great preponderance of evidence that all of the facts stated in said special charge No. 7 were true, and if the jury believed from the evidence that the facts stated in said special charge No. 7 were true, the plaintiff was not entitled to recover."

MILLARD PATTERSON,
J. A. BUCKLER,
J. F. WOODSON,
Attorneys for the El Paso & Southwestern Railway Company.

(Indorsed:) No. 424. In U. S. Cir. Ct. W. D. T. at El Paso, Texas. H. D. Vizard *vs.* The El Paso & Southwestern Ry. C. Assignments of Error by the El Paso & Southwestern Ry. Co. Filed June 16, 1906. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Western District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between H. D. Vizard, plaintiff, and the El Paso & Southwestern Railway Company, defendant, in case No. 424 on the Docket of said Court, at El Paso, Texas, in the Western District of Texas, a manifest error hath happened, to the great damage of the said El Paso & Southwestern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be

duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, *to* command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of June, in the year of our Lord one thousand nine hundred and six. D. H. HART,

Clerk of the U. S. Cir. —, W. D. T.

Allowed this, the 16th day of June, 1906.

T. S. MAXEY, *United States Judge.*

(Endorsed:) No. 424. H. D. Vizard *vs.* El Paso Southwestern Railway Company. Writ of Error. Filed June 16th, 1906. D. H. Hart, Clerk, by Geo. B. Oliver, Deputy.

THE UNITED STATES OF AMERICA, *Fifth Judicial Circuit:*

The President of the United States to H. D. Vizard, or Patterson & Wallace (a firm composed of Charles B. Patterson and George E. Wallace), attorneys at Law of El Paso, Texas, his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Fifth Circuit at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the Clerk's Office of the Circuit Court of the United States for the Western District of Texas in the cause wherein H. D. Vizard was plaintiff and the El Paso & Southwestern Railway Company defendant, said cause being No. 424 on the Docket of said U. S. Circuit Court, to show cause, if any there be, why the judgment rendered against the said El Paso & Southwestern Railway Company, defendant in said cause, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States, and the seal of said Circuit Court, this 16th day of June in the year of our Lord one thousand nine hundred and six.

Signed this, the 16th day of June 1906.

(Signed) T. S. MAXEY,

United States Judge.

Attest: D. H. HART, *Clerk.*

(Endorsed:) No. 424. H. D. Vizard *vs.* El Paso Southwestern Railway Co. Citation. We hereby accept service of this citation in error this June 18th 1906 on behalf of H. D. Vizard Defendant in error. Chas. B. Patterson, Geo. E. Wallace Attorneys for H. D. Vizard. Filed June 18th 1906. D. H. Hart, Clerk, By Geo. B. Oliver, Deputy.

86 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA, *Western District of Texas:*

I, D. H. Hart, Clerk of the Circuit Court of the United States for the Western District of Texas, do hereby certify that the above and foregoing is a true and correct transcript, the same being on 110 pages, numbered from 1 to 110 inclusive, of the proceedings had in said Court in a certain cause therein pending, to-wit: No. 424. H. D. Vizard, *vs.* The El Paso & Southwestern Railroad Company, as the same appears from the original papers in said cause now on file in my office, and from the records thereof in the minutes of said Court.

In testimony whereof, witness my official signature and the seal of said Court, at the El Paso Division thereof, in the city of El Paso, Texas, this the 11th day of July, A. D. 1906.

[SEAL.] D. H. HART, *Clerk*,
By GEO. B. OLIVER, *Deputy*.

87 November Term, 1906.

(Extract from Minutes.)

No. 1589. NOVEMBER 15, 1906.

EL PASO & SOUTHWESTERN RAILROAD COMPANY
vs.
H. D. VIZARD.

On this day this cause was regularly called, and after argument by Millard Patterson, Esq., for plaintiff in error, and Geo. E. Wallace, Esq., for defendant in error, was submitted to the court.

88 U. S. Circuit Court of Appeals. Filed Dec. 13, 1906. Charles H. Lednum, Clerk.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1589.

EL PASO & SOUTHWESTERN RAILROAD CO., Plaintiff in Error,
v.
H. D. VIZARD, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Texas.

Before Pardee, McCormick and Shelby, Circuit Judges.

By the COURT: A majority of the Judges are satisfied that none of the assignments of error are well taken, therefore the judgment of the Circuit Court is affirmed.

89 November Term, 1906.

(Extract from Minutes.) DEC. 13, 1906.

No. 1589.

EL PASO & SOUTHWESTERN RAILWAY COMPANY
vs.
H. D. VIZARD.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Texas, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, The El Paso & Southwestern Railway Company, and the sureties on the writ of error bond herein, J. F. Williams and John A. Happer, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

90 In the U. S. Circuit Court of Appeals, Fifth Circuit.

No. 1589.

EL PASO & SOUTHWESTERN RAILROAD CO., Plaintiff in Error,
vs.
H. D. VIZARD, Defendant in Error.

Millard Patterson, J. A. Buckler, Counsel for Plaintiff in Error.
U. S. Circuit Court of Appeals. Filed Dec. 25, 1906.
CHARLES H. LEDNUM, *Clerk*.

91 In the U. S. Circuit Court of Appeals, Fifth Circuit.

No. 1589.

EL PASO & SOUTHWESTERN RAILROAD CO., Plaintiff in Error,
vs.
H. D. VIZARD, Defendant in Error.

Millard Patterson, J. A. Buckler, Counsel for Plaintiff in Error.

To the Honorable United States Circuit Court of Appeals, Fifth Circuit:

Now comes the El Paso & Southwestern Railroad Co., plaintiff in error, in the above styled cause, and respectfully asks that it be granted a rehearing in the above styled cause and that the judgment of this Honorable Court in the above styled cause rendered on the 13th day of December, 1906, may be reconsidered and set aside for the following reasons.

(1) The question in this case is not one of abstract law,
92 and it is not what would be the law of some other case, but what is the law applicable to the facts alleged by the plaintiff in his petition on which the case was tried and the facts proven on the trial. The plaintiff in his petition alleges as the very ground of negligence which gave the Federal Court jurisdiction that the railroad company had failed to provide the water car with hand holds and grab irons for his use in climbing on the car. If, as he alleges, these appliances were required by law to be put on the car for his use, then, as a matter of course, as is shown by the U. S. Circuit Court of Appeals, Eighth Circuit, in Gilbert *vs.* Burlington C. R. I. & N. Co., 128 Fed. Rep. p. 529, if they were on the car it was his duty to use

them, and if he ignored them, and, being only 5 feet 5¾ inches high tried to jump up and catch a hand rail seven feet from the ground at the rear end of the car as it passed him, he was guilty of contributory negligence or assumed the risk and could not recover (See also American Linseed Oil Co. *vs.* Hines, 141 Fed. Rep. pp. 45-50).

(2) If the Safety Appliance Act requiring the placing of hand holds and grab irons on the car had no application in the case under the evidence then the U. S. Circuit Court (the trial court) had no jurisdiction over the case, and it should have been dismissed.

(3) As this case was removed from the District Court of El Paso County, Texas, to the U. S. Circuit Court W. D. T. at El Paso, Texas, upon the ground that it involved the application and construction of a law of the United States (a Federal question), and as the defendant in the trial court (the plaintiff in error) was a corporation organized under the laws of Arizona Territory, the U. S. Circuit Court only had jurisdiction of the case on the ground that it involved a
93 Federal question, and as the case presented by the plaintiff in the trial court was based, in so far as the U. S. Circuit Court had jurisdiction, entirely upon the fact, as alleged by plaintiff, that the U. S. Safety Appliance Act had been violated and that the defendant was guilty of negligence in the following respects, to-wit: That the water car from which he alleged he fell "did not have the usual, customary and necessary hand holds and grab irons maintained thereon," and did not have "on the standards of said car hand holds to be used by employés in climbing on the car," and did not have "sufficient grab irons maintained on the end of said cars as provided by the statutes of the United States," and the Railroad Company "failed, neglected and refused to have maintained on said car any hand holds or grab irons on the standards or any grab irons on the end of said car; that said water car was used in interstate shipments and was not properly equipped with all the safety appliances and grab irons as provided by the statutes of the United States, and that with knowledge that said car was being used in interstate shipments and interstate traffic defendant neglected and refused to provide said car with hand holds and grab irons as provided by statute"; under the pleading of the plaintiff and under the facts in evidence as shown by the bill of exceptions in this case, this Honorable Court erred in failing and refusing to sustain the third specification or assignment of error heretofore urged in its brief by the plaintiff in error which said third specification or assignment of error was as follows:

"The trial court erred in refusing to give the jury defendant's special charge No. 3, which was to the effect that if the jury believed from the evidence in the case that the water car No. 522 was
94 equipped at the time of the accident mentioned in the evidence with grab irons, hand holds and a stirrup on the front right corner of the same, and that the plaintiff attempted to mount the car as he testified he did, at the rear corner of the right side of the water car, as the same was being pulled in an easterly direction

where there was no stirrup or grab iron, then they should return a verdict in favor of the defendant, and that upon this issue the burden of proof was upon the plaintiff, and it was incumbent upon him to establish the fact by a preponderance of the evidence that the water car was not equipped at the right hand front corner of the same as the car approached him with grab irons or hand holds. If the facts stated in the special charge No. 3 were found by the jury to be true, and it being shown by the preponderance of the evidence that they were true, the plaintiff was not entitled to recover."

(4) This Honorable Court erred in refusing to sustain the 7th specification or assignment of error presented in the brief of plaintiff in error, which was as follows:

"The trial Court erred in refusing to give the jury special charge No. 7, requested by the defendant, which was to the effect: 'That if the jury believed from the evidence that there were hand holds or grab irons and a stirrup at the front right hand corner of the water car, when the plaintiff attempted to mount the same, and plaintiff failed to use the same, and attempted to mount the car at the rear right hand corner of the same, then they should find a verdict for the defendant. It was shown by a great preponderance of evidence that all of the facts stated in said special charge No. 7 were true,
95 and if the jury believed from the evidence that the facts stated in said special charge No. 7 were true, the plaintiff was not entitled to recover.'"

(5) This Honorable Court erred in refusing to sustain the first specification or assignment of error urged in the brief of plaintiff in error, which was as follows:

"The trial court erred in refusing to charge the jury to find a verdict for the defendant as requested by the defendant's special charge No. 1, as the evidence showed by a great preponderance and conclusively that the water car mentioned in the plaintiff's petition, and in the evidence from which he alleges he fell, was equipped at the front right hand corner of same with hand holds, grab irons and a stirrup for plaintiff's use, and that plaintiff, if he attempted to mount the water car mentioned in the evidence as he testified he did at the southwest corner of the same, did so at a place and in a manner that was negligence on his part."

(6) This Honorable Court erred in refusing to sustain the 2nd specification or assignment of error urged by plaintiff in error which was as follows:

The trial court erred in refusing to charge the jury to find a verdict for defendant as requested in defendant's special charge No. 1 as the evidence showed by a great preponderance and conclusively that the plaintiff attempted to mount the water car mentioned in the evidence and in his petition in an unnecessarily dangerous way and in an unusually dangerous way, and if injured at all, was injured through a risk assumed by him in not using the appliances required by law which defendant had provided for his use."

Your petitioner prays that an order may be made for a rehearing of the argument in this case on a day to be appointed by the Court

at the present term, and upon such points as the Court may
96 direct, or that the Court may grant a rehearing and reconsider the case upon the brief heretofore filed herein by counsel.

MILLARD PATTERSON,
J. A. BUCKLER,
Counsel for El Paso & Southwestern Railroad Co., Plaintiff in Error.

We hereby certify that, in our opinion, the foregoing motion for a rehearing is well founded in point of law.

MILLARD PATTERSON,
J. A. BUCKLER,
Counsel for the El Paso & Southwestern Railway Company, Plaintiff in Error.

97 November Term, 1906.

(Extract from Minutes.)

JAN 15, 1907.

No. 1589.

EL PASO & SOUTHWESTERN RAILROAD COMPANY
vs.
H. D. VIZARD.

Ordered that the petition for rehearing filed in this cause be, and it is hereby, refused.

98 *Writ of Error.*

United States Circuit Court of Appeals, Fifth Circuit.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error,
versus
H. D. VIZARD, Defendant in Error.

Assignments of Error.

The El Paso & Southwestern Railroad Company, the Plaintiff in Error in the above styled cause, in connection with its petition for writ of error from the Supreme Court of the United States to the U. S. Circuit Court of Appeals, Fifth Circuit, makes the following assignments of error:

First.

Said Circuit Court of Appeals erred in affirming the judgment of the U. S. Circuit Court, and in refusing to sustain the Third Assignment of Error of Plaintiff in Error, which was as follows:

The Trial Court erred in refusing to give the jury defendant's special charge No. 3, which was to the effect that if the jury believed

from the evidence in the case that the water car No. 522 was equipped at the time of the accident mentioned in the evidence with grab irons, hand holds and a stirrup on the front right corner of the same, and that the plaintiff attempted to mount the car as he testified he did, at the rear corner of the right side of said water car, as the same was being pulled in an easterly direction where there was no stirrup or grab iron, then they should return a verdict in favor of the defendant, and that upon this issue the burden of proof was upon the plaintiff and it was incumbent upon him to establish the
99 fact by a preponderance of the evidence that the water car was not equipped at the right hand front corner of the same as the car approached him with grab irons or hand holds. If the facts stated in the special charge No. 3 were found by the jury to be true, and it being shown by the great preponderance of the evidence that they were true the plaintiff was not entitled to recover.

Second.

The said Circuit Court of Appeals erred in affirming the judgment of the U. S. Circuit Court and in refusing to sustain the Seventh Assignment of Error of the Plaintiff in Error, which was as follows:

The Trial Court erred in refusing to give the jury special charge No. 7, requested by the defendant, which was to the effect: "That if the jury believed from the evidence that there were hand holds or grab irons and a stirrup at the front right hand corner of the water car, when the plaintiff attempted to mount the same, and plaintiff failed to use the same, and attempted to mount the car at the rear right hand corner of the same then they should find a verdict for the defendant. It was shown by a great preponderance of evidence that all of the facts stated in said special charge No. 7 were true, and if the jury believed from the evidence that the facts stated in said special charge No. 7 were true, the plaintiff was not entitled to recover."

Third.

Said Circuit Court of Appeals erred in affirming the judgment of the U. S. Circuit Court, and in refusing to sustain the First Assignment of Error of Plaintiff in Error, which was as follows:

The Trial Court erred in refusing to charge the jury to find a verdict for the defendant as requested by the defendant's special charge No. 1, as the evidence showed by a great preponderance and conclusively that the water car mentioned in the plaintiff's petition, and in the evidence, from which he alleges he fell, was equipped at
100 the front right hand corner of same with hand holds, grab holds, grab irons and a stirrup for plaintiff's use, and that plaintiff if he attempted to mount the water car mentioned in the evidence, as he testified he did, at the southwest corner of the same, did so at a place and in a manner that was negligence on his part.

Fourth.

Said Circuit Court of Appeals erred in affirming the judgment of the U. S. Circuit Court, and in refusing to sustain the Second Assignment of Error of the Plaintiff in Error, which was as follows:

The Trial Court erred in refusing to charge the jury to find a verdict for defendant as requested in defendant's special charge No. 1, as the evidence showed by a great preponderance and conclusively that the plaintiff attempted to mount the water car mentioned in the evidence and in his petition, in an unnecessarily dangerous way, and in an unusually dangerous way, and if injured at all, he was injured through a risk assumed by him in not using the appliances required by law which defendant had provided for his use.

Wherefore the El Paso & Southwestern Railroad Company, Plaintiff in Error, prays that the judgment of the U. S. Circuit Court of Appeals for the Fifth Circuit, in said cause, and the judgment of the U. S. Circuit Court, may be reversed and said cause remanded to the U. S. Circuit Court, W. D. T. at El Paso, Texas, for a new trial.

MILLARD PATTERSON,
J. A. BUCKLER,
Attorneys for the El Paso & Southwestern Railroad Company, Plaintiff in Error.

The foregoing has the following indorsements to wit: No. 1589. El Paso & Southwestern Railroad Co., Plaintiff in Error *vs.* H. D. Vizard, Def't in Error. Assignments of error. Filed 1st day of February 1907. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

101 In the Circuit Court of Appeals for the Fifth Circuit.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error,
vs.
H. D. VIZARD, Defendant in Error.

Petition for Writ of Error.

Your petitioner, the El Paso & Southwestern Railroad Company, Plaintiff in Error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and that a judgment has therein been rendered on the 13th day of December, 1906, affirming the judgment of the Circuit Court of the United States for the Western District of Texas; that a motion for rehearing was over-ruled in said cause on January 15th, 1907; and that the matter in controversy in said suit exceeds Two thousand dollars, besides costs; and that the jurisdiction of none of the courts above mentioned, is or was dependent in any wise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of the different states, and that this cause does not arise under the Patent Laws, nor the Revenue Laws, nor the Criminal Laws, nor that it is

not an Admiralty case, and that it is a proper case to be reviewed by the United States Supreme Court upon a Writ of Error; and

Therefore your petitioner, the El Paso & Southwestern Railroad Company, would respectfully pray that a Writ of Error be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Fifth District to send the record and proceedings in said cause, with all things concerning the
102 same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said Plaintiff in Error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

EL PASO & SOUTHWESTERN RAILROAD CO.,
Plaintiff in Error,
By MILLARD PATTERSON, *Its Attorney.*

The foregoing petition is granted, and a Writ of Error allowed as prayed for, upon Plaintiff's giving bond according to law in the sum of Fifteen thousand dollars.

February 1st, 1907.

DON A. PARDEE,
United States Circuit Judge.

The foregoing has the following indorsements to-wit: No. 1589. El Paso & Southwestern Railroad Co., Plaintiff in Error, *vs.* H. D Vizard, Defendant in Error. Petition for writ of error. Filed 1st day of February 1907. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

103 *Bond of Writ of Error to the United States Circuit Court of Appeals, 5th Circuit.*

In case—

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error,
vs.
H. D. VIZARD, Defendant in Error.

Know all men by these presents, that we, the El Paso & Southwestern Railroad Company, as principal, and U. S. Stewart and J. F. Williams as sureties, are held and firmly bound unto H. D. Vizard, in the full and just sum of Fifteen thousand dollars, to be paid to the said H. D. Vizard, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals this — day of February, 1907, conditioned that:

Whereas lately at a Circuit Court of Appeals for the Fifth Circuit, in a suit depending in said court between the El Paso & Southwestern

Railroad Company, Plaintiff in Error, and H. D. Vizard, Defendant in Error, a judgment was rendered against the said El Paso & Southwestern Railroad Company, Plaintiff in Error, (said suit having been taken by the El Paso & Southwestern Railroad Company as Plaintiff in Error, by Writ of Error from the U. S. Circuit Court W. D. T. of El Paso, Texas, to the U. S. Circuit Court of Appeals, Fifth Circuit)
104 and the said El Paso & Southwestern Railroad Company having obtained a Writ of Error and filed a copy thereof in the Clerk's office of the U. S. Circuit Court of Appeals, Fifth Circuit, to reverse the judgment in the aforesaid suit, and a citation directed to the said H. D. Vizard citing and admonishing him to be and appear at the session of the Supreme Court of the United States, to be holden at the City of Washington, as the law provides;

Now, the condition of the above obligation is such that if the said El Paso & Southwestern Railroad Company shall prosecute said Writ of Error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

EL PASO & SOUTHWESTERN RAILROAD CO.,
By MILLARD PATTERSON,
Its Att'y & Ag't.

U. S. STEWART.
J. F. WILLIAMS.

STATE OF TEXAS, *County of El Paso:*

We, U. S. Stewart and J. F. Williams whose names are subscribed as sureties to the foregoing bond, state under oath, that we are each worth the sum of Seven thousand Five hundred dollars in property subject to execution, over and above all of our just debts and liabilities.

U. S. STEWART.
J. F. WILLIAMS.

Subscribed and sworn to before me this 29th day of January, 1907.

C. J. DEAN,
Notary Public, El Paso County, Texas.

105 STATE OF TEXAS, *County of El Paso, W. D. T.:*

I, D. H. Hart Clerk of the United States Circuit Court, W. D. T. at El Paso, Texas, do certify that the foregoing sureties J. F. Williams and U. S. Stewart are good and sufficient, and I would approve the foregoing bond, if presented to me for approval.

Witness my official signature at El Paso, Texas, this 29th day of January, 1907.

D. H. HART,
Clerk U. S. Circuit Court, W. D. T.,
By GEO. B. OLIVER, *Deputy.*

I approve the foregoing bond this 1st day of February, 1907.

DON A. PARDEE,
United States Circuit Judge.

The foregoing has the following indorsements to-wit: No. 1589. El Paso & Southwestern Railroad Co., Plaintiff in Error *vs.* H. D. Vizard, Defendant in Error. Bond for Writ of Error. Filed 1st day of February 1907. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

106 *Writ of Error to the Circuit Court of Appeals Fifth Circuit.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, between the El Paso & Southwestern Railroad Company, Plaintiff in Error, and H. D. Vizard, Defendant in Error, a manifest error hath happened, to the great damage of the said Plaintiff in Error, as by its complaint appears; we, being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington within — days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February, in the Year of our Lord One thousand Nine hundred and seven.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

Allowed this first day of February, 1907.

DON A. PARDEE,
United States Circuit Judge.

[Endorsed:] No. 1589 El Paso & Southwestern Railroad Co. Pl'ff in error *v.* H. D. Vizard Def't in error Writ of error Filed 1 day of Feb'y 1907 Charles H. Lednum Clerk of the United States Circuit Court of Appeals.

A copy of this writ of error is this day lodged in the clerk's office for the use of defendant in error.

Attest:

February 15th, 1907.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

107 *Writ of Error to the Circuit Court of Appeals, Fifth Circuit. Citation in Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to H. D. Vizard, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein the El Paso & Southwestern Railroad Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the first day of February, in the Year of our Lord One thousand Nine hundred and Seven.

DON A. PARDEE,
United States Circuit Judge.

[Endorsed:] No. 1589. Original. El Paso & Southwestern Railroad Co. Pl'ff in error *vs.* H. D. Vizard Def't in error. Citation in error. Original. Service of this Citation in error is accepted and acknowledged this 11th day of Feb'y 1907 on behalf of H. D. Vizard Def't in error. Geo. E. Wallace, Att'y for H. D. Vizard Def't in error. Filed 15 day of Febr'y, 1907. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

108 United States Circuit Court of Appeals, Fifth Circuit.

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages numbered from 1 to 107, inclusive, contain a true copy of the record, assignment of errors, and all proceedings had, including the opinion of the court, in the case of El Paso & Southwestern Railway Company, plaintiff in error, *versus* H. D. Vizard, defendant in error, No. 1589, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 15th day of February, A. D. 1907.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 20,591. U. S. circuit court of Appeals, 5th circuit. Term No. 245. El Paso & Southwestern Railroad Company, plaintiff in error, *vs.* H. D. Vizard. Filed February 27th, 1907. File No. 20,591.

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 245.

EL PASO & SOUTHWESTERN RAILROAD COMPANY,
Plaintiff in Error.

vs.

H. D. VIZARD, Defendant in Error.

In error to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Comes now H. D. Vizard, Defendant in Error in the above styled and numbered cause, and moves the Court to dismiss the writ of error in this case, for the following reasons, and each of them, to-wit:

First: Because this court has no jurisdiction of this case on the ground that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, to which this writ of error is directed, is a final judgment.

Second: Because no federal question was raised in the trial court, and neither did the opinion of the Circuit Court of Appeals, in affirming the case, involve any federal question.

Third: Because this court is without jurisdiction, for the reason that the question at issue, and on which the case was decided by the Court of Appeals, was one purely of fact and not of law, and no federal question being involved, the judgment of the Circuit Court of Appeals was final.

Fourth: Because although, in the opinion of this court, the record may show that this court has jurisdiction, it is manifest that the said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

GEO. E. WALLACE,
Attorney for Defendant in Error, for the Purpose of this Motion.

To Millard Patterson, Attorney for Plaintiff in Error, El Paso, Texas.

Sir:—

You will take notice that on the 14th day of October, 1907, the Motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for a decision of the court thereon. Annexed hereto is a copy of my brief in support of said motion to dismiss or affirm.

GEO. E. WALLACE,
Attorney for Defendant in Error, for the Purpose of this Motion.

BRIEF.

On the 13th day of April, 1906, a judgment was rendered in the United States Circuit Court for the Western District of Texas, in favor of the Defendant in Error against the Plain-

tiff in Error, in the sum of Nine Thousand Dollars ($9,000.00.) (Tr. of Rec. 28.)

In due time Plaintiff in Error filed its motion for a new trial, alleging that the trial court erred in refusing to give certain special instructions requested. No question of a federal nature was raised by the Plaintiff in Error in the trial court, or by its motion for a new trial. (Tr. of Rec. 29.)

In due time, Plaintiff in Error, sued out a writ of error to the United States Circuit Court of Appeals, at New Orleans, and filed seven assignments of error, each of which raised the question of error on the part of the trial court in refusing certain special instructions asked. (Tr. of Rec. 69-71.)

The United States Circuit of Appeals on the 13th day of December, 1906, affirmed the case (Tr. of Rec. 73.) Whereupon Plaintiff in Error filed its petition for writ of error to this court, and also filed four assignments of error, complaining of the action of the United States Circuit Court of Appeals in affirming said judgment, and each of said assignments of error complained of the failure of the Court of Appeals to reverse the judgment on the ground of error in the trial court, in refusing special instructions asked. (Tr. of Rec. 77-79.)

We submit that this court is without jurisdiction to maintain a writ of error, for the reason that as there are no federal questions involved in this case, the judgment of the United States Circuit Court of Appeals is final.

The trial, both in the lower court, and the Court of Appeals, was purely and simply on a question of fact. The trial court, as well as the Court of Civil Appeals, on reviewing the facts, held that the special charges complained of by Plaintiff in Error were either covered by the main charge of the trial court, or inapplicable to the facts of the case, and for this reason the trial court correctly refused said special charges.

We submit that the record shows in this case that this court is without jurisdiction to entertain the writ of error, and ask that the same be dismissed; but in the event the court should be in doubt as to its jurisdiction, then we contend that

the record shows that the writ of error was taken for delay only, and that the question on which the jurisdiction depends, is so frivolous as not to need further argument, and in that event ask that the case be affirmed.

GEO. E. WALLACE,
Attorney for Defendant in Error.

I hereby acknowledge copy of the foregoing motion, notice and brief, and waive service and notice of filing.

MILLARD PATTERSON,
Attorney for El Paso & Southwestern Railway Company, Plaintiff in Error.

September 18, 1907.

19

Office Supreme Court, U. S.
FILED.
NOV 30 1908
JAMES H. McKENNEY,
CLERK.

No. 31.

IN THE

Supreme Court of the United States

(October Term, 1907)

EL PASO & SOUTHWESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

H. D. VIZARD, *Defendant in Error.*

Counsel for plaintiff in error, the El Paso & Southwestern Railroad Company, respectfully submit the following citation of authorities in addition to the authorities cited in their brief in the above styled cause:

Upon the proposition that as the plaintiff, Vizard, in his declaration (first amended original petition) claimed that the controversy was one that turned on the application and construction of the laws of the United States (Safety Appliance Act), and that he was entitled to recover on account of said Safety Appliance Act, and both the trial court and the U. S.

Circuit Court of Appeals, (5th Circuit) dealt with the case on such allegations, it cannot be contended that the U. S. Supreme Court is without jurisdiction to review the case. We cite:

Schlemmer vs. B. R. & P. Ry. Co., 205 U. S., p. 9.

Yates vs. Jones National Bank, 206 U. S., 167.

N. O. M. & T. R. R. Co. vs. State of Mississippi, 102 U. S., p. 135-144.

St. Paul M. & M. Ry. Co. et al vs. St. Paul & N. P. R. R. Co., 68 Fed. Rep., p. 2, and cases referred to therein.

Files vs. Davis, 118 Fed. Rep., p. 470.

Monigault vs. S. M. Ward & Co. et al, 123 Fed., p. 711, and the numerous cases cited therein.

Upon the proposition that as the evidence showed that the water car which plaintiff attempted to mount was equipped at the front right hand corner (where plaintiff should have mounted the water car) as required by the U. S. Safety Applance Act, with hand-holds and grab-irons, and that he should have used the same, and that as plaintiff ignored the same and attempted to mount the car at the rear corner, an unnecessarily dangerous place, in an unnecessarily and unusually dangerous way, by attempting to jump upon the journal box and catch a hand-rail seven feet from the ground, he had no right to recover. We cite:

Tuttle vs. Ry. Co., 122 U. S., p. 189.

Powell vs. Ry. Co., 159 Fed. Rep., p. 864.

Ry. Co. vs. Conway, 156 Fed. Rep., 234.

Smith vs. Ry., 144 Fed. Rep., 668.

Ry. Co. vs. Davis, 63 Fed. Rep., 61.

In Cunningham vs. Ry. 17 Fed. Rep., 882 (Justice Miller) the Court said: "If a man puts himself into a dangerous position voluntarily, when there are other positions in connection with the discharge of his duties which are safe, he cannot recover from the railroad company damages for the injury which he has brought about by his own negligence."

See also the following cases, which we insist are directly in point:

Ry. vs. Hamlin, 79 N. E. p. 1040 (Ind.)
Carrier vs. Ry. Co., 59 Pac., 1075, 61 Kas., 447.
Ferguson vs. Ry., 69 N. W., 1026, 100 Ia., 733.
Perry vs. Alkali Co., 114 N. W., 315, 150 Mich., 537.
State to use of Miller vs. Ry. 65 Atl., 635, 105 Md., 30.
Warden vs. L. & N. R. R., 14th L. R. A., p. 552, 94 Ala., 277.
Montgomery vs. Ry., 83 S. W., p. 66 (Missouri).

In the case last cited, it appears that the plaintiff, who was a switchman, threw a switch and stepped on a brake beam, grabbing the hand-hold on the south end of the car. It was shown in the evidence that the car had at the north end and on the side a stirrup and hand-hold. The Court said: The evidence shows that switchmen frequently incur risks which seem almost incredible, but may be accounted for by the fact that constant exposure to danger dulls the sense of caution and engenders recklessness, but the courts cannot approve a custom so fraught with peril as an excuse for want of proper care—such a rule would impose upon the master the insurance and indemnity of its employe against his own wrong. And quoting from Bailey on Personal Injuries, Section 1121, the Court says: "It is a familiar principle, which common sense as well as the rules of law ought to teach one, that where an

employe of a railroad knowingly selects a dangerous way when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence."

See also Doerr vs. Brewing Assn., 176 Mo., p. 547.

Ry. vs. Moseley, 38 S. E., 350.

Jaynes vs. Coal Co., 108 Mich., 242.

Respectfully submitted,

MILLARD PATTERSON,

Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
OCT 23 1907
JAMES H. McKENNEY,
Clerk.

Supreme Court of The United States

OCTOBER TERM 1907.

No. 81.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error,

vs.

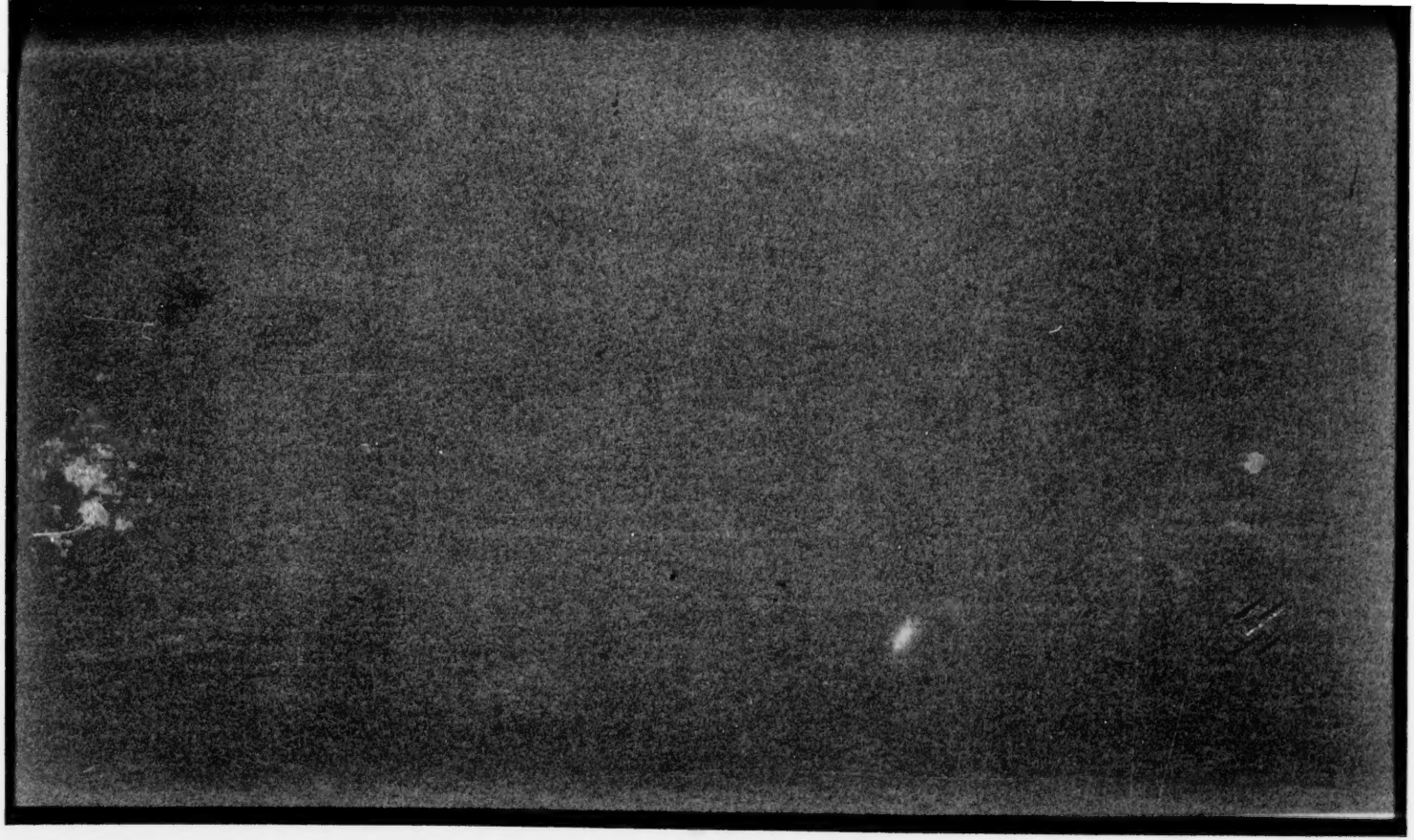
H. D. VIZARD,

In error to the United States Circuit Court of Appeals for the Fifth Circuit.

Reply of Plaintiff in Error to Motion to dismiss Writ of Error.

MILLARD PATTERSON,
ATTORNEY FOR EL PASO AND SOUTHWESTERN RAILROAD CO.
PLAINTIFF IN ERROR.

Rapid Press, Washington, D. C.



Supreme Court of The United States

OCTOBER TERM 1907.

No. 245

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error.

vs.

H. D. VIZARD,

In error to the United States Circuit Court of Appeals for the Fifth Circuit.

Reply of Plaintiff in Error to Motion to dismiss Writ of Error.

To the Hon. Supreme Court of the United States:

Now comes the El Paso & Southwestern Railroad Company, Plaintiff in Error, and replying to

the motion of H. D. Vizard, Defendant in Error, to dismiss the writ of error in the above styled cause, respectfully submits the folllowing:

First-Counter Proposition

As the case made by H. D. Vizard in his First Amended Original Petition, upon which the case was tried in the United States Circuit Court at El Paso, Texas, was based upon an alleged violation of, and involved the application and construction of, a law of the United States, to-wit: What is known as "The Safety Appliance Act", it involved a Federal question; and as the jurisdiction of said United States Circuit Court was based upon that ground, and was not based in any way upon the diversity of citizenship of the parties, the judgment of the United States Circuit Court of Appeals (5th Circuit) is not made final by Sec. 6 of the Judiciary Act of March 3rd, 1891, and the writ of error in this case should not be dismissed.

Second Counter-Proposition.

As the Plaintiff, Vizard, in his declaration (1st amended original Petition) claimed that the controversy was one that turned on the application and construction of the laws of the United States (the Safety Appliance Act), and both the Trial Court and the United States Circuit Court of Appeals dealt with the case on that assumption, it can not be contended that this Honorable Court is without jurisdiction to review the case, no jurisdiction having ever obtained or been recognized on account of diversity of citizenship.

Third Counter-Proposition

When a case arises under the laws of the United States, and on that ground jurisdiction is

assumed by the Court below, a writ of error will lie from the United States Supreme Court to the United States Circuit Court of Appeals to review a judgment of the latter court.

Statement

This suit was commenced in the District Court of El Paso County, Texas, 41st District, by original petition filed April 18, 1904. (Printed Trans. p. 4-7). On January 25, 1906 plaintiff, H. D. Vizard, filed in the District Court of El Paso County, Texas, his "first amended original petition," in which he, for the first time, alleged that the El Paso & Southwestern Railway Company was liable to him for damages in the sum of $25,000.00 on account of injuries received through the negligence of defendant in failing to comply with what is known as the "Safety Appliance Act". In said first amended original petition the plaintiff, H. D. Vizard alleged that he was a brakeman on one of defendant's trains, being operated in Arizona Territory; and that as he was attempting to mount a certain water car, the hand railing, on account of its defective and unsafe condition, gave way at the corner where he attempted to mount the car, and he fell and was injured; and in said first amended original petition he alleged that the defendant was guilty of negligence in the following respects: That said car did not have the usual customary and necessary hand holds and grab-irons maintained thereon: that in addition to said hand rail above mentioned (in the petition) in order to properly equip said car it was the duty of said defendant company to have maintained on the standards of said car through which said hand rail was run, reasonably safe and sufficient hand holds to be used by employes in climbing on said car and also reasonably safe, suit-

able and sufficient grab-irons maintained on the end of said car, as provided by the Statutes of the United States; that the said defendant company had at said time failed, neglected and refused to have maintained on said car any hand holds or grab-irons on the standards or any grab-irons on the end of said car (Pr. Tr. p. 17). That the said water car "which was used in interstate shipment was not properly equipped with all the safety appliances and grab-irons as provided by the Statutes of the United States" (Pr. Tr. p. 18), and "with knowledge that said car was being used in interstate shipments and interstate traffic, defendant neglected and refused to provide said car with grab-irons and hand holds as provided by Statute (Pr. Tr. p. 19); and in said first amended original petition he prayed as before damages in the sum of $25,000 for said personal injuries. (Pr. Tr. p. 21).

On February 14th, 1906, the El Paso & Southwestern Railway Company filed in said state court its petition for removal, also its bond for removal, to the United States Circuit Court, W. D. T. at El Paso, Texas; and on February 14th, 1906, the District Court of El Paso County, Texas, entered an order removing said cause to said United States Circuit Court. (Pr. Tr. pp. 20, 21, 22, 23, 24).

The case was tried in the United States Circuit Court, W. D. T. at El Paso, Texas, on April 11, 1906, and the trial resulted in a judgment in favor of the plaintiff for the sum of $9,000.00. (Pr. Tr p. 28). A motion for new trial filed by defendant was overruled, and the plaintiff was by the Trial Court required to enter a remittitur of $3,000.00 and judgment was rendered after the remittitur reducing the judgment in the plaintiff's favor to the sum of six thousand dollars. (Pr. Tr. p. 31).

The case was taken by writ of error from the United States Circuit Court, W. D. T. at El Paso,

Texas, to the United States Circuit Court of Appeals for the fifth circuit at New Orleans; and at the November term of the said United States Court of Ap peals for the fifth circuit, the judgment of the Trial Court was affirmed. (Pr. Tr. 73).

Authorities and Remarks

In the following csaes it is held that after filing of plaintiff's first amended original petition in the state court, in which he alleged for the first time a violation by defendant of the Federal Statute (the Safety Appliance Act), and sued to recover upon that ground, the case was removable to the United States Circuit Court.

Ex parte Lennon. 166 U. S. p. 548.

Toledo, A. & N. M. Ry. Co. vs. Penn. Co. 54 Fed. Rep. p. 732.

Ex parte Lennon 64 Fed. Rep. p. 320.

Mastin vs. C., R. I. & P. Ry. Co. 123 Rep. p. 827.

Tift vs. So. Ry. Co. 123 Fed. Rep. p. 789-793.

Bailey vs. Mosher, 63 Fed. Rep. p. 488.

It was alleged in the original petition of the plaintiff, H. D. Vizard, filed in the state court April 18, 1904, that the defendant, the El Paso & Southwestern Ry. Co., was a corporation operating a line of railway through the territories of Arizona and New Mexico and to the city of El Paso, Texas, (Pr. Tr. p. 64). The same allegation was made in the plaintiff's first amended petition (Pr. Tr. p. 15).

In the petition for removal to the United States Circuit Court, W. D. T. at El Paso, Texas, it was shown that the El Paso & Southwestern Ry. Co., defendant, was and is a corporation duly incorporated and org anized under the laws of the territory of Arizona. There is no allegation whatever in the plaintiff's pleading giving to the United States Circuit Court, W. D. T. at El Paso, Texas,

jurisdiction over the case by removal excepting the allegations of fact calling for the application and construction of United States Statute known as "The Safety Appliance Act" and his whole case, so far as the jurisdiction of the United States Circuit Court, W. D. T. at El Paso, Texas, is concerned, is based upon the application and construction of what is known and alleged violation as "The Safety Appliance Act". (see Plntfs. 1st original petition, Pr. Tr. pp. 15 to 19).

We think that the motion filed by H. D. Vizard, defendant in error, in this case to dismiss the writ of error is not in compliance with the rules in any; and this Honorable Court should refuse to consider the same. But in as much as the que tion of jurisdiction would arise in the case even if no motion were filed, respectfully present this reply in order that this Honorable Court may be acquained with the facts in the record.

In Flordia Cen. & Pen. R. R. Co. vs. Bell, 176 United States pp. 321 to 335, we think that every question that could arise in so far as the right of this court to review the judgment of the Circuit Court of Appeals is concerned, is discussed and answered. The writ of error in the case at bar was brought under Sec. 6 of judiciary act of March 3. 1891; and, as we have shown, the jurisdiction of the United States Circuit Court, W. D. T. at El Paso, was not at all dependent upon the opposite parties being citizens of different states; in truth and fact, as the records show, there was no diversity of citizenship, the El Paso & Southwestern Ry. Co. being an Arizona corporation, and the plaintiff, H. D. Vizard, being a resident of Texas. As is said in Florida Central & Peninsular R. R. Co. vs. Bell, in the quotation from the judgment of the Circuit Court of Appeals. "There is no effort in this case to found the jurisdiction of the court on

the diverse citizenship of the parties. There is nothing in the record to indicate that the judge of the Circuit Court entertained jurisdiction of the case on that ground." And quoting now partly from the opinion of our Supreme Court in the case cited, we say: "As, then, the plaintiff in the Circuit Court claimed in his declaration that the controversy was one that turned on the application and construction of a law of the United States, and based his right to recover upon a violation of a statute of the United States to-wit: "The Safety Appliance Act": and as both the courts below, that is the U. S. Circuit Court, W. D. T. at El Paso, and the U. S. Circuit Court of Appeals at New Orleans, dealt with the case on that assumption, it is plain that it cannot be successfully contended in this court that the judgment of the Circuit Court of Appeals was final."

We think the opinion in the case cited, Flo. Cen. & Peninsular R. R. Co. vs. Bell, 176 U. S. pp. 321-335, shows clearly that this case is one in which this Honorable Court has a right to supervise the judgment of the Circuit Court of Appeals.

If as the defendant in error, H. D. Vizard now contends in his motion, the Safety Appliance Act requiring hand holds and grab irons on the water car mentioned in the plaintiff's petition, upon which the case was tried, had no application in the case then this Honorable Court would not dismiss the writ of Error but would enter an order such as was entered in the case of Florida Cen. & Peninsular R. R. Co. vs. Bell, reversing the judgment of the U. S. Circuit Court of Appeals and of the Circuit Court W. D. T. at El Paso, Texas, and either remand the case to the U. S.

Circuit Court, with directions to dismiss the action for want of Jurisdiction, or with directions as in the case of Sawyer et al. vs. Kochersperger, 170 U. S. p. 303, to remand the case to the District Court of El Paso County, Texas.

Respectfully submitted,

MILLARD PATTERSON,

ATTORNEY FOR EL PASO AND SOUTHWESTERN RAILROAD CO.

PLAINTIFF IN ERROR.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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In Supreme Court of the United States

OCTOBER TERM, 1907.

NO. 31.

EL PASO & SOUTHWESTERN RAILROAD CO.,
Plaintiff in Error,

vs.

H. D. VIZARD,
Defendant in Error.

WRIT OF ERROR TO U. S. CIRCUIT COURT OF APPEALS, 5TH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

~~STATEMENT OF NATURE AND RESULT OF THE SUIT.~~

MILLARD PATTERSON,
Attorney for the El Paso & Southwestern Railway Co.,
Plaintiff in Error.

J. D. HUGHES PRINTING COMPANY, EL PASO

In Supreme Court of the United States

OCTOBER TERM, 1907.

NO. 245.

EL PASO & SOUTHWESTERN RAILROAD CO.,
Plaintiff in Error.

vs.

H. D. VIZARD,
Defendant in Error.

WRIT OF ERROR TO U. S. CIRCUIT COURT OF APPEALS, 5TH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF NATURE AND RESULT OF THE SUIT.

This suit was commenced in the District Court of El Paso County, Texas, (41st District) by original petition filed April 18, 1904, by H. D. Vizard against the El Paso & Southwestern Railroad Co. to recover damages in the sum of $25,000.00 for personal injuries alleged to have been received by him in Arizona Territory on February 22, 1904. He alleged that he was

a brakeman on one of defendant's trains and that as he was attempting to mount a certain water car the hand railing on account of its defective and unsafe condition, gave way at the corner where he attempted to mount the car, and he fell and was injured, and he alleged that the defendant was negligent in allowing the hand rail at the place where he attempted to mount the car to be in a defective and unsafe condition, (Pr. Tr. pp. 4-7). Afterward, while the case was pending in the District Court of El Paso County, Texas, on the 25th day of January, 1906, the plaintiff filed his first amended original petition alleging and setting up for the first time a claim for damages under the U. S. Safety Appliance Act and that the defendant was guilty of negligence in the following respects: "That said car did not have the usual, customary and necessary hand holds and grab irons maintained thereon; that in addition to said hand rail above mentioned (in the petition) in order to properly equip said car it was the duty of said defendant company to have maintained on the standards of said car through which said hand rail was run reasonably safe and sufficient hand holds to be used by employes in climbing on the said car, and also reasonably safe, suitable, and sufficient grab irons maintained on the end of said car as provided by the Statutes of the United States; that the said defendant company at said time had failed, neglected and refused to have maintained on said car any hand holds or grab irons on the standards or any grab irons on the end of said car." (Pr. Tr. p. 17). That the said water car "which was used in interstate shipment was not properly equipped with all the safety appliances and grab irons as provided by the Statute of the United States" (Pr. Tr. p. 17), and "with knowledge that said car was being used in interstate shipments and interstate traffic defendant neglected and refused to pro-

vide said car with grab irons and hand holds as provided by statute (Pr. Tr. p. 17); and in said first amended original petition he prayed as before damages in the sum of $25,000.00 for said personal injuries (Pr. Tr. p. 19).

On February 14, 1906, the defendant filed in said State court its petition for removal of said cause to the U. S. Circuit Court W. D. T. at El Paso, Texas, (Pr. Tr. pp. 20-22). Also its bond for removal to said U. S. Circuit Court (Pr. Tr. p. 23); and on February 14, 1906, the District Court of El Paso County, Texas, entered an order removing said cause to the U. S. Circuit Court for the Western District of Texas, at El Paso, Texas, (Pr. Tr. p. 24).

After said cause was removed to the U. S. Circuit Court W. D. T. at El Paso, Texas, the defendant filed its second amended original answer setting up, among other things, that if the plaintiff was injured on account of the accident mentioned in his petition he was injured in consequence of and as the result of an ordinary risk or an unnecessary risk assumed by him in the discharge of his duties as the employee of the defendant. Further that if plaintiff was injured in consequence of the accident mentioned in his petition he was injured through his own negligence, in this: (1) That if he attempted to mount it at an improper place and on the wrong side; (2) that he attempted to mount the same in an improper way at a corner where there were no hand holds and no grab irons; (3) that he ignored the appliances which had been placed upon the car for his use in mounting the car in safety; (4) that he should not have attempted to mount the water car mentioned in his petition as he did, but should have caught the right hand corner of the front or the rear car or some other car in the train; (5) that he should have mounted the car, if at all, at the right hand first

corner on the engineer's side, which he failed to do; (6) that if he attempted to mount the car at all, as he alleges, he attempted to mount the same in an unnecessarily dangerous way, whereas there was a reasonably safe way plain and open to him. (Pr. Tr. pp. 25-26).

The case was tried in the U. S. Circuit Court W. D. T. at El Paso, Texas, on April 11, 1906, and the trial resulted in a judgment in favor of the plaintiff for the sum of $9,000.00 (Pr. Tr. p. 28).

A motion for new trial was filed by defendant on April 13, 1906, (Pr. Tr. p. 29), which was overruled on the 13th day of April, 1906, after the plaintiff entered a remittur in the sum of $3,000.00 (Pr. Tr. p. 30). The judgment was entered after the remittur reducing the judgment in plaintiff's favor to the sum of $6,000.00 (Pr. Tr. p. 31).

The case was taken by writ of error to the U. S. Circuit Court of Appeals (5th Circuit) at New Orleans, and the judgment of the trial court affirmed at November term, 1906. (Pr. Tr. p. 73). And to review the action of the Circuit Court of Appeals as well as the trial court the case is now brought by writ of error to this Honorable Court.

As the matter may be mentioned in this court, we respectfully suggest that, after the filing of plaintiff's 1st amended original petition in the State Court in which he alleged for the first time a violation by defendant of a Federal Statute (the Safety Appliance Act) and sought to recover upon that ground, the case was removable to the U. S. Circuit Court.

Toledo A. & N. M. Ry. Co. vs. Penn. Co., 54 Fed. Rep. p. 732.

Ex Parte Lennon, 64 Fed. Rep. p. 320.

Mastin vs. C. R. I. & P. Ry. Co., 123 Fed. Rep. p. 827.

Tift vs. So. Ry. Co., 123 Fed. Rep. p. 789-793.

Bailey vs. Mosher, 63 Fed. Rep. p. 488.

Ex Parte Lennon, 166 U. S. p. 548.

Upon the trial it was shown conclusively or by a great preponderance of the evidence that the water car which plaintiff attempted to mount was equipped at the front right hand corner (where plantiff should have mounted the water car) as required by the U. S. Safety Appliance Act with hand holds and grab irons, and that plaintiff ignored the same and attempted to mount the car at the rear corner, an unnecessarily dangerous place, in an unnecessarily and unusually dangerous way. The defendant asked a peremptory charge in its favor, and several other special charges, before the jury retired, which were refused by the court and the assignments of error urged herein are based upon the trial court's action in refusing the same.

The plaintiff in the trial court having based his case upon an alleged violation of the Safety Appliance Act when it was shown conclusively that the water car from which he alleges he fell was equipped as required by that act and that he was injured, if injured at all, through his own act in ignoring the devices put on the car for his use, we contend that he should not have been allowed to recover.

FIRST SPECIFICATION OR ASSIGNMENT OF ERROR

The U. S. Circuit Court of Appeals erred in affirming the judgment of the U. S. Circuit Court and in refusing to sustain the third assignment of error of plaintiff in error, which was as follows:

"The trial court erred in refusing to give the jury defendant's special charge No. 3, which was to the effect that if the jury believed from the evidence in the case that the water car

No. 522 was equipped at the time of the accident mentioned in the evidence with grab irons, hand holds and a stirrup on the front right hand corner of the same, and that the plaintiff attempted to mount the car as he testified he did, at the rear corner of the right side of the said water car, as the same was being pulled in an easterly direction where there was no stirrup or grab iron, then they should return a verdict in favor of the defendant, and that upon this issue the burden of proof was upon the plaintiff, and it was incumbent upon him to establish the fact by a preponderance of the evidence that the water car was not equipped at the right hand front corner of the same as the car approached him with grab irons or hand holds. If the facts stated in the special charge No. 3 were found by the jury to be true, and it being shown by the great preponderance of the evidence that they were true, the plaintiff was not entitled to recover."

Proposition 1. If the water car was equipped with hand holds and a stirrup or step for plaintiff's use, and he ignored the same and attempted to mount the water car at the southwest corner as he says he did, he was guilty of negligence or assumed the risk and could not recover.

Proposition 2. The plaintiff having alleged that the water car was not equipped with hand holds and grab irons and that defendant was negligent in not having same equipped with such safety appliances for his use, the burden was upon him to establish this fact.

Statement. The defendant asked the special charge No. 3 referred to in the foregoing assignment of error (which was refused by the court) to the effect that if the jury believed from the evidence that the water car No. 522 was equipped with grab irons, hand holds and a stirrup on the front right hand corner

and that the plaintiff attempted to mount the car as he testified he did at the rear corner of the right side of the water car as the same was being pulled in an easterly direction where there was no stirrup or grab iron, then they should return a verdict in favor of the defendant, and in this special charge the defendant sought to have the trial court charge the jury that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence that the water car was not equipped at the right hand front corner of the same as the car approached him with grab irons or hand holds, and to the court's refusal of the charge the defendant excepted, while the jury were still in the box, upon the ground that if the jury found the facts stated in same to be true the plaintiff was not entitled to recover.

This special charge No. 3 requested by the defendant and the other special charges hereinafter mentioned, were asked by the defendant while the jury were still in the box after the court had given to the jury its general charge and also a certain special charge in favor of the plaintiff. (See Pr. Tr. p. 62).

The general charge of the court (Pr. Tr. pp. 58-62) presented the case to the jury upon the question (1) as to whether or not the defendant was guilty of negligence in allowing the hand rail to be without a nut at the west end of the same so that it slipped out of the standard and allowed the plaintiff to fall, and (2) referring to contributory negligence, whether or not, in attempting to mount the car at the southwest corner as he did, the plaintiff was exercising such care as a person of ordinary prudence would have exercised under similar circumstances.

The first amended original petition of the plaintiff (Pr. Tr. pp. 15-19) alleged that the defendant was guilty of negligence in not having the hand rail secured in the standard from which

it was pulled out or in not having a nut on the end of the same, and alleged also as a ground of negligence and as an excuse for not using the hand holds, etc., that the defendant company was guilty of negligence "in not having the usual, customary and necessary hand holds and grab irons maintained thereon," and proceeded to allege in detail that the defendant had violated the United States Safety Appliance Act in not having the usual, customary and necessary hand holds and grab irons on the car. (Pr. Tr. pp. 16-17).

And notwithstanding the allegations of plaintiff's first amended original petition just referred to, which allegations were in effect an attempt on plaintiff's part to justify his conduct in mounting the car as he did, plaintiff asked a special charge, which was given by the trial court to the effect that, although this water car did have a stirrup and hand hold on the standard at the front end of the car, still he had a right to ignore the hand hold and stirrup put there for his use, if the jury believed from the evidence that it was usual and customary for brakemen to mount the car at the rear end where there was no hand hold and stirrup and no safety appliances (Pr. Tr. p. 62). This very special charge requested by the attorneys for the plaintiff as we have suggested, recognized the fact that the evidence showed that the water car did have a stirrup and hand hold on the standard at the front right hand corner (Pr. Tr. p. 62).

H. D. Vizard testified that he weighed 170 pounds at the time of the accident and that his height is 5 feet 5 3-4 inches. (Pr. Tr. p. 36). The accident happened about 3:15 o'clock p. m. (Pr. Tr. p. 35). The ground there at the time was about level with the ties. (Pr. Tr. p. 33).

The uncontradicted testimony of C. A. Brown, under whose

direction and supervision the car was built, was as follows: "It was four feet and one inch from the top of the rail to the top of the platform of that water car, and it was 34 inches from the top of the platform to the hand rail that runs along the side of the car. (Pr. Tr. p. 49).

It is a matter of general knowledge that it is several inches from the top of the tie to the top of the rail of a railroad track. H. D. Vizard himself testified that "at the time of the accident as the water car passed me I attempted to jump, or did jump, and attempted to catch the iron railing. I made a jump at it and the rail pulled out." (Pr. Tr. p. 37).

R. P. Moore, plaintiff's own witness, testified on cross-examination that the appliances are put on the front right hand corner of the car for the use of an employe or brakeman in getting on the car. "That is what they are put there for, and that is why the law requires them to be put there." (Pr. Tr. p. 42).

C. A. Brown testified that this water car was made under his direction and supervision. He describes its construction in detail. He says: "That the hand rail is put along the side of the car to keep a man from falling as he goes from one end of the car to the other; to keep a man from falling off when the car is moving. It is not designed for any other purpose." (Pr. Tr. p. 49).

A. E. Carne testified on cross-examination and said that he had had 20 years' experience in the train service and that he did not recollect of ever seeing the hand rail on a water car such as that mentioned in the evidence low enough to reach from the ground. (Pr. Tr. p. 52).

C. G. Cornelius testified that he had had 21 years of experience as conductor and brakeman, and on cross-examination said: "That rail was not put there to get on the car with. The

hand holds are put on the front right hand corner for the purpose of enabling a man to hang on the side of the car and ride the same out or to get up on the car." (Pr. Tr. p. 53).

A diagram appears on page 33 of the transcript by the use of which the court can easily understand all the evidence.

The water car was standing on the coal chute track and an engine backed in from the east with two box cars and coupled on to the water car. The two box cars and the water car were then backed westerly to the coal chute and coupled on to another box car, and as the water car with the three box cars was being pulled out by the engine in an easterly direction plaintiff alleges and testifies that he attempted to mount the water car at the rear right hand corner of the same, that is, at the southwest corner of the same where there were no hand hold, grab iron or stirrup; that the number of the water car was 522 of the El Paso & Southwestern make (Pr. Tr. pp. 32-33). Plaintiff alleged and his witnesses testified that the accident happened on February 22, 1904.

H. H. Dick, witness for defendant, testified positively that he examined the water car on the morning of February 23, 1904, and the water car had stirrups, hand holds and grab irons as they are indicated on the photograph introduced in evidence, that it had on it at the two corners (diagonally opposite each same. That he saw it on the 21st day of February, 1904, and that it had on it at the two corners(diagonally opposite each other) as indicated in the photographs stirrups, grab irons and hand holds and the devices indicated by the photographs. (Pr. Tr. p. 45).

That he had seen this water car number 522 often in the transaction of his business as inspector and it was always equipped with grab irons and stirrups at the corners as indi-

cated in the photographs. (Pr. Tr. p. 47). That the grab iron on the side and the one on the guard rail standard is for mounting the car, and the one on the end of the sill is for use in operating the lever. If the water car were being pulled in an easterly direction the grab irons and hand holds would be for the use of a man in mounting the car. That is what they are there for. (Pr. Tr. pp. 45-46).

W. J. Spaulding, witness for defendant, testified that he was car inspector of defendant at Douglas in February, 1904; that he saw the water car No. 522 on the morning of February 23, 1904; it then had the stirrups, hand holds and grab irons indicated in the photographs; that he knew that during the month of February, 1904, this water car number 522 was equipped with stirrups at the corners diagonally opposite from each other and that it was equipped with grab irons as indicated in the photographs. (Pr. Tr. pp. 47-48). That from his experience in the railroad business and in the yard he would say that the usual and customary practice respecting the matter of mounting a car that is approaching a brakeman where a car is being pulled in an easterly direction would be to catch the car at the grab iron and use the sill step or stirrup. (Pr. Tr. pp. 47-48).

C. A. Brown, a witness for defendant, testified that he was Train Master for the defendant in the month of February, 1904, living in Douglas, Arizona. That he knew this water car No. 522. That the two photographs introduced in evidence were correct photographs of the two ends of the car. That the water car was built under his direction. That it was equipped as shown by the photographs. That he saw the water car in use frequently. That the water car during all the time was equipped with these devices, hand holds, grab irons and stirrups that

are shown in the picture. He stated the dimensions of the car, describing it somewhat in detail. That the hand rail was put along the side of the car to keep a man from falling as he goes from one end of the car to the other. It is not designed for any other purpose. That the usual and customary way of mounting the car by a brakeman as the car approaches him, if the car is being pulled in an easterly direction, would be to catch the car as the same approached him at the front right hand corner. That there is no other place where a man could get on with safety. That the hand holds and grab irons and stirrups are put on the corner of the car to enable a brakeman or switchman to catch on the car. (Pr. Tr. pp. 49-50).

E. L. McAfee, a witness for defendant, testified that his business was locomotive engineer; that in February, 1904, he was running an engine for the defendant out of Douglas; that he was at Osborn on the day the plaintiff was injured and that on that day he picked up water car No. 522. That he, as engineer, moved the two box cars in upon the coal chute track to couple on to the water car and then backed down to the coal chute; that as engineer he would have occasion to pick up this water car and would have occasion to see it.

That he knew that this water car was equipped with stirrup and hand holds and grab irons at that time; that the car was constructed with the devices shown in the pictures. (Pr. Tr. p. 50).

J. B. Caruthers, witness for defendant, testified that he was a conductor in the employment of the defendant during the month of February, 1904; that stirrups, hand holds and grab irons are usually located on the front right hand corner of a car as a car is being pulled; they are put on the car for the purpose of getting on the car. If a car was being pulled in an east-

erly direction a brakeman standing on the right hand side or engineer's side of the train would usually and customarily catch the car on the front right hand corner where the stirrup and hand holds are in order to mount the same—to get on the car to ride out to a switch. This is the usual and customary practice. (Pr. Tr. p. 51).

On re-cross examination he stated that he had seen brakemen catch the hand rail to a water car such as the one mentioned in the evidence at the rear end of the car and put their foot on the journal box or oil box and ride the car out; that it was more dangerous for a man to attempt to mount the car at the rear end than to mount it at the corner where the grab iron, hand holds and stirrup are. That in case a man should attempt to mount the car at the corner where there is no stirrup, grab iron or hand hold he would have nothing to hold himself to in case he slipped.

A. E. Carne, a witness for defendant, testified that he was a railroad man of 20 years' experience in the train service; that if a car were being pulled in an easterly direction the south side would be the engineer's side and the brakeman being on the engineer's side the usual and customary way to mount the car to ride upon the same would be by using the step and hand hold at the front right hand corner as the car approached him; that is the usual and customary practice. That he did not recollect of ever seeing the hand rail on a water car such as that mentioned in the evidence low enough to reach from the ground. The witness explained why it was very dangerous for a man to attempt to catch the hand rail and ride the car at the corner at the rear end. (Pr. Tr. p. 52).

C. G. Cornelius testified that he had been in the railroad service as a conductor and brakeman for about 21 years. That

the right hand side of the train is the engineer's and a brakeman's side; that it would be usual and customary for a brakeman when a car was being pulled in an easterly direction by him to catch the car at the front right hand corner where the hand holds are; "the hand holds are put there for that purpose, to enable a man to hang on the side of the car and ride upon the same or to get upon the car." That he himself had caught the hand rail and put his foot on the oil box and had seen others do it; that he had never got hurt, but he had seen other men get hurt. That from his experience he would say that it would be more dangerous for a man to attempt to catch the car at the rear end where there was no hand hold and no stirrup than it would be to catch the car at the front right hand corner where there was a stirrup, and hand hold. (Pr. Tr. p. 53).

C. L. Hoy, witness for defendant, testified substantially to the same facts as are testified to by the witnesses Caruthers, Carne and Cornelius, and stated that the devices, that is, the stirrup at the front right hand corner, and the hand hold, are put there for the purpose of enabling a brakeman to mount a car or hang on the side of the same and ride the car out; and that is the proper way to do it. (Pr. Tr. pp. 53-54).

W. G. Rowe, witness for defendant, testified that he has had about ten years' experience in the train service handling and operating trains; that the brakeman being on the right hand side of the train, that is, on the engineer's side, as cars were pulled out by him in an easterly direction, it would be usual and customary for him if he desired to catch a car and hang on the same and ride out, to catch the car at the front right hand corner where the stirrup and hand hold are. That he had seen men mount cars by catching the hand rail and putting their foot on the journal box, but that is not the right way

to mount a car; that the hand hold and stirrup are put there for that purpose. (Pr. Tr. pp. 54-55).

A. C. Atherton, a witness for plaintiff, testified on cross-examination, that the steps and hand holds are put on the front or right hand corner of the car for the purpose of enabling a man to get on the car or to hold on the car. (Pr. Tr. pp. 55-56).

W. D. Foth, a witness for plaintiff, testified on cross-examination that the stirrup and the hand holds were put on the front right hand corner of the car for use; that they were not put there for ornament. (Pr. Tr. pp. 56-57).

R. P. Moore, witness for plaintiff, on cross-examination, described the construction of a water car such as the one mentioned in the evidence, and said on direct examination that he would consider it a fair practice for a brakeman to attempt to grab the hand rail and put his foot on the truck or oil box and ride out on the car in that position to the switch, but on cross-examination he said hand holds and stirrups and grab irons are safety appliances to assist the employes and those that are working on the cars for their safety and assistance. Their primary specific purpose is to enable employes to get on the cars or to hang on the side, and if the water car mentioned in the evidence had been pulled out by him in an easterly direction and he were on the south or engineer's side and there were a hand hold and grab iron on the corner of the car and stirrup he would get on the car where the stirrup and hand hold and grab iron and these appliances were; that would be the ordinary place where an employe or brakeman would get on the car; if these appliances are there I would say that this is the safest place. *That is what they are put there for.*

An on cross-examination he said that "if a man should attempt to get on the rear corner of the car, if he should slip or

fall, there would be danger of a car behind running over him. It is true that a brakeman mounting a car as the engine pulls a car by him, should take the first right hand corner of the car." (Pr. Tr. pp. 42-43).

The only evidence tending to show in any way that the water car was not equipped with stirrups, hand holds and grab irons was that of H. D. Vizard, who said on his direct examination that "the car had nothing at all on it except this hand rail around the car." (Pr. Tr. p. 33).

Before his cross-examination it was shown that this case was tried in the District Court of El Paso County, Texas, in the latter part of the year 1904. On his cross-examination H. D. Vizard was asked the following question: "Q. I want to know if you did not say on the trial of this case before that you did not know whether that car had a stirrup and hand holds at the other end or not?" And the witness said that he might have said it and that if he said it it was true, then he said it might have been true. Then he stated that he did not remember. He then said that since he had gotten to thinking about it there was none on it. Then this question was put to him: "Q. Still you swore in the State Court that you did not know whether it had a grab iron on it or not?" His answer was: "Yes, sir; in the State Court I was in an awful predicament, too." (Pr. Tr. pp. 35-36).

It was shown by the stenographer's report of the trial of this case in the District Court at the October term, 1904, of El Paso County, Texas, which stenographic report of the evidence was admitted to be correct, the plaintiff, H. D. Vizard, being shown a picture of the car testified as follows: "Q. Now, Mr. Vizard, we will say that that picture is a correct picture of the car as it was going east and you got on at this corner down

here" (indicating the southwest corner)? A. I got on at that corner (indicating the southwest corner). If there was a stirrup on the other end I do not know. There was none where I got on. I got on at the corner at the end of the car and right hand of the engine. (Pr. Tr. p. 43).

R. S. Claye, a witness for plaintiff, testified on this trial that there was no hand hold or grab iron on the car; that he examined it. (Pr. Tr. pp. 39-40). It was shown upon cross-examination that Claye was a comrade, companion and "pal" of the plaintiff Vizard; that he had testified on the former trial of the case in the District Court of El Paso County, Texas, in the fall of 1904; that before the trial of this case in the U. S. Circuit Court he had talked about the case with Mr. Patterson, counsel for plaintiff, and about the trial of it in the U. S. Circuit Court; that he had "several times lately discussed with him the necessity of saying that the car had no hand holds and no grab irons and had also discussed the necessity of saying that it did not have a stirrup." (Pr. Tr. pp. 40-41).

He further testified on this trial in the U. S. Circuit Court that he found the nut off the end of the hand rail at the southwest corner of the car, and that he did not state on the trial in the State Court that he found the nut off at the northwest corner of the car. He further testified that he quit his job at Douglas and come down to El Paso with the plaintiff Vizard. (Pr. Tr. pp. 40-41-42).

Upon this trial it was admitted that the Report of the Evidence made by A. B. Redding, in the trial of the case in the District Court of El Paso County, Texas, was correct, and counsel for defendant read from the same the evidence of R. S. Claye given by him upon cross-examination upon the trial in the District Court of El Paso County, Texas, in October, 1904. It was

shown that the witness Claye was testifying on said trial about the water car mentioned in the evidence, to-wit, El Paso & Southwestern water car No. 522, and that he stated "that there was a hand hold on the car and grab iron in handling cars to grab on. That the grab iron or hand hold was fastened to the post. That there were steps or a stirrup to step on hung below the car; that there was one on each side of the car; that the stirrup with reference to the place where the rod was bent down at the west end was on the other end; that he knew there was one on that side, on the other end from the place where the rod was bent down (that is, at the other end from the place where Vizard claims that he attempted to get on and fell). (Pr. Tr. p. 43). It was further shown that on the trial of the case in the State Court this witness Claye testified positively that he found the nut off and the bent rail at the northwest corner of the car; that he knew that. (Pr. Tr. p. 44).

The defendant introduced in evidence plaintiff's original petition filed in this case in the State Court on April 13, 1904, showing that "there is no allegation or intimation in said original petition to the effect that the water car was not properly equipped with hand holds and grab irons and stirrups." The defendant also introduced an original petition which was filed in the U. S. Circuit Court at El Paso on March 8, 1904, based upon the accident complained of in this case, showing that in said original petition filed in said U. S. Circuit Court "there is no allegation or intimation whatever to the effect that this E. P. & S. W. water car No. 522 was not properly equipped with stirrups, hand holds and grab irons."

Defendant also introduced the plaintiff's first amended original petition filed in said case in the U. S. Circuit Court above mentioned on April 9, 1904, and in said amended original peti-

tion there is no allegation or intimation to the effect that the water car was not properly equipped with hand hold, grab irons and stirrups. (Pr. Tr. pp. 54-55).

As is shown in the foregoing statement, the court in its general charge and in giving the special charge asked by plaintiff's counsel (notwithstanding the fact that plaintiff had himself alleged as a ground of negligence and as an excuse for trying to get on the car by the hand rail at the rear end of same that there were no appliances on the car) instructed the jury that plaintiff could ignore the appliances which were on the car, and recover, if he was doing the work in a usual and customary way, and to save the point and to have the converse given to the jury as the law this special charge No. 3 was asked. That this special charge embodies the law and should have been given after the refusal of special charge No. 1 is, we think, abundantly shown by the authorities. This special charge No. 3 was not asked until after our peremptory charge No. 1 had been refused.

SECOND SPECIFICATION OR ASSIGNMENT OF ERROR

The U. S. Circuit Court of Appeals erred in affirming the judgment of the U. S. Circuit Court, and in refusing to sustain the seventh assignment of error of plaintiff in error, which was as follows:

"The trial court erred in refusing to give the jury special charge No. 7, requested by the defendant, to the effect "that if the jury believe from the evidence that there were hand holds or grab irons and a stirrup on the front right hand corner of the water car, when the plaintiff attempted to mount the same, and plaintiff failed to use the same and attempted to mount at the rear right hand corner of the same, then they should find a

verdict for the defendant." It was shown by a great preponderance of the evidence that all the facts stated in said charge were true; and if the jury believed from the evidence that the facts stated in said special charge No. 7 were true, plaintiff was not entitled to recover.

Proposition. If the water car was equipped with hand holds and a stirrup on the front right hand corner for plaintiff's use, and he ignored the same and attempted to mount the car as he says he did, he was guilty of negligence or assumed the risk, and could not recover.

Statement. See statement under first assignment of error, pages 6 to 19, this brief.

The defendant asked the special charge No. 7, referred to in the foregoing assignment of error, which was refused by the court. Said special charge No. 7, omitting the caption, was as follows: "If the jury believe from the evidence that there were hand holds or grab irons and a stirrup at the front right hand corner of the water car, when the plaintiff attempted to mount the same, and plaintiff failed to use the same and attempted to mount the car at the rear right hand corner, you will find a verdict for the defendant." And to the court's action in refusing same, defendant excepted. (Pr. Tr. p. 64).

Special charge No. 3, asked by defendant, had already been refused by the court. Said special charge No. 3 was also upon the law as to the burden of proof; and this special charge No. 7 was almost identical with it, omitting the charge as to the burden of proof. (See Pr. Tr. pp. 62-63). To the court's action in refusing this special charge No. 7 defendant excepted upon the ground that if the jury believed the facts therein mentioned, plaintiff was not entitled to recover. (Pr. Tr. p. 64).

Argument and Authorities under the foregoing First and Second Assignments of Error.

The plaintiff's case was based upon an alleged violation of Sec. 4 of the Act of March 2, 1893, Chapter 196 (Safety Appliance Act). He claimed that he was injured in consequence of the fact that the defendant had failed to provide the water car from which he alleges he fell, with grab irons or hand holds for his use; and that in consequence of such failure, he was required to mount the water car by catching the hand rail seven feet from the ground at the rear end of the car. His amended original petition, upon which the case was tried, was framed so as to secure the advantages of Sec. 8 of said Safety Appliance Act, declaring that where an employe may be injured by any car in use contrary to the provisions of the act, he shall not be deemed thereby to have assumed the risk.

The evidence shows that the water car from which Vizard alleges he fell, was being pulled in an easterly direction, and that instead of mounting the same at the front right hand corner, where there were grab irons, hand holds, and a stirrup for his use, he attempted to mount the same at the rear corner by grabbing a hand rail at least seven feet from the ground while the car was in rapid motion, at a place where there were no grab irons or hand holds, and was no stirrup for his use, and at a place that was exceedingly dangerous.

In American Linseed Oil Co. vs. Hines, 141 Fed. Rep. pp. 45-50, the U. S. Circuit Court of Appeals of the Eighth Circuit holds that where an employe contributes to his own injury by unnecessarily subjecting himself to a known danger he is not relieved from the charge of contributory negligence nor from its effect by the fact that it was a common thing for other em-

ployes to take the same risk. In this case the employe, instead of passing over a platform which was a comparatively safe way, attempted to jump over a drum and his leg was caught and crushed. The court says that the dangerous character of the machinery was so generally recognized as to be made a subject of legislation.

We may suggest in the case at bar that the Congress of the United States have legislated about the matter of hand holds and appliances for the use of employes, and we think it unreasonable to hold that the employe can ignore the appliances provided for his use in conformity with the law and then say that he is not guilty of contributory negligence or say that he did not assume the risk of such conduct. It may be argued by counsel for defendant in error in this case that the evidence shows that it was a common thing for employes to attempt to mount a car as the defendant in error attempted to mount the water car No. 522. This argument is fully answered in the case of the American Linseed Oil Co. vs. Hines, just cited, where the court says that the argument is not a new one and is completely answered in the case of Gilbert vs. Burlington C. R. & N. Co., 128 Fed. Rep. 529.

In Gilbert vs. Burlington C. R. & N. Ry. Co., 128 Fed Rep. pp. 529-539, the court holds that it is the duty of a railway employe to use the appliances provided for his use and particularly the appliances required by the Safety Appliance Act, and that where he fails to use such appliances and exposes himself to an unnecessary danger he assumes the risk of injury. In this case last mentioned it was argued that the evidence of several witnesses showed that it was the custom or habit of the employes of the company to ignore the level appliance supplied for the employes' use, and do the work another way, and it was

insisted "that it was not negligence for the plaintiff to follow the ordinary course pursued by his associate operators in cases of this character," but the court says, quoting from the Dawson case, that "if a man exposes himself to a risk unnecessarily he is guilty of negligence, although other persons may have done the same thing and escaped unhurt. The inherent quality of an act is not changed whether done by one or many."

In Morris vs. Duluth S. S. & A. R. R. Co., 108 Fed. Rep. pp. 747-750, the U. S. Circuit Court of Appeals, (Eighth Circuit), held that where an employe could have done the work he was called upon to do with comparative safety by the use of appliances which had been provided by the defendant for the express purpose of enabling the plaintiff to avoid the danger and risk to which he elected to expose himself and where he selected a more dangerous method, ignoring the appliances provided for his use, he necessarily assumed the risk of the injury which he sustained and could not recover. (See also the numerous cases cited in the opinion of the court).

In Dawson vs. C. R. I. & P. Ry. Co., 114 Fed. Rep. pp. 870-871-872, the U. S. Circuit Court of Appeals (Eighth Circuit), held that where a brakeman seized a grip iron on the ends of a flat car and put his foot on a swinging brake beam to ride to a car which he had been directed to take up and was killed, and it was shown that the car next to the flat car was supplied with hand holds and appliances designed for the brakeman's use in order that he might use the same in case he desired to ride out as he did, and he ignored the hand holds and appliances, he was guilty of negligence contributing to his death, precluding a recovery. In discussing the case the court says: "It appears that there were stirrups and hand holds on the side of the box car which he might have used without any risk of injury. He

was in a situation where he could have done what he desired to do in a perfectly safe way. He thought it however proper to place himself in a position of great peril where a slight misadventure meant instant death or serious injury. *Conceding it to be true that brakemen sometimes take such risks without any sufficient cause or excuse, yet such act should nevertheless be pronounced negligent.* Such conduct on the part of the brakeman and others ought also to be discouraged. If a man exposes himself to great risk unnecessarily he is guilty of negligence although it be shown that other persons may have done the same thing and escaped unhurt. The inherent quality of an act is not changed whether it is done by one or many." And the court, in conclusion, refers to its opinion in Morris vs. Ry. Co., 108 Fed. Rep. pp. 747-749, sustaining the very propositions we urge.

In Weed vs. Chicago, St. P., M. & O. Ry. Co., 99 N. W. Rep. p. 828, the plaintiff in the trial court alleged that the defendant had failed to equip a car which he attempted to mount with the necessary steps or means of boarding the said car. The evidence showed that Weed attempted to catch hold of the moving car from which he fell (an ordinary flat car) by putting one foot on the brake beam in front, and the other on the side. The trial court held that he could not recover; that the evidence showed that the car was constructed, equipped and had proper appliances for the employe's use and that Weed necessarily assumed the risk in attempting to mount the car as he did and could not recover.

In Montgomery vs. C. G. W. Ry. Co., 83 S. W. Rep. pp. 66-67 (Mo.), it was shown that the plaintiff, a brakeman, instead of mounting a car to ride the same out upon a switch by the use of the stirrup and hand hold put on the car for that purpose

undertook to ride the car out by catching a hand hold on the rear of the car and putting his foot on the brake beam. The car was jolted, in some way, his foot slipped off of the brake beam, and he was injured. It was held that he could not recover, as he assumed the risk in undertaking to do his work in such a dangerous way and ignoring the devices which had been prepared for his safety.

In Baltimore & Potomac R. R. Co. vs. Jones, 95 U. S. pp. 439-443, the Supreme Court holds that where an employe places himself in an unnecessarily dangerous position and is injured where he might have done his work without unusual exposure, he cannot recover. In this case the trial court submitted the case to the jury and the only point upon which the case was reversed was the refusal of the trial court to give a special charge substantially the same as the special charges asked in the case under consideration.

In Suttle vs. Choctaw O. & G. R. Co., 144 Fed. Rep. pp. 668-669, the U. S. Circuit Court of Appeals for the Eighth Circuit again reviews a case where an employe ignored the devices provided for his use and undertook to uncouple a caboose from a train of freight cars in an unnecessarily dangerous way, and the court reannounced the law as laid down by it in the case of Morris vs. Duluth S. S. & A. Ry. Co., 108 Fed. Rep. p. 747, and in Gilbert vs. Burlington C. R. I. & N. R. Co., 128 Fed. Rep. p. 529.

See also in this connection Crookston Lumber Co. vs. Boutin, 149 Fed. 686.

In Quironet vs. Alabama & Great Southern R. R. Co., 36 S. E. 599, (Supreme Court of Georgia, July, 1900), it appears that an employe attempted to mount a car (which was being pulled by him as in the case under consideration) from the side by

catching a standard and fell and was injured. It was shown that there were steps upon the caboose and other cars with proper appliances for mounting the caboose and other cars, and the court says the evidence shows that the employe "could have reached the car by going first upon the caboose or other cars which had appropriate appliances for use in going upon them, and it was his duty to have used the more appropriate and less dangerous method. In such a case the use of a more dangerous method, even though it be one of greater convenience, would preclude a recovery if injury results."

The evidence showing that Vizard attempted to use the hand rail at the southwest corner of the car for a purpose for which it was not intended, he assumed the risk of being injured.

Wood on Master and Servant, Sec. 402.

Bailey's Master's Liability, p. 22.

Sherman & Redfield on Negligence, Vol. 1, p 346 and the numerous cases cited in note 4.

THIRD SPECIFICATION OR ASSIGNMENT OF ERROR

The U. S. Circuit Court of Appeals erred in affirming the judgment of the U. S. Circuit Court, and in refusing to sustain the first assignment of error, which was as follows: "The trial court erred in refusing to charge the jury to find a verdict for the defendant, as requested by defendant's special charge No. 1, as the evidence showed by a great preponderance, and conclusively, that the water car mentioned in the plaintiff's petition, and in the evidence, from which he alleges he fell, was equipped on the front right hand corner of same with hand holds and grab irons and a stirrup for plaintiff's use, and that plaintiff, if he attempted to mount the car mentioned in the evidence, as he testified he did, at the southwest corner of the same,

did so at a place and in a manner that was negligence on his part."

Proposition. Where an employe ignores the devices and appliances provided for his use and undertakes to do his work by an unnecessarily dangerous way, and is injured, he is guilty of contributory negligence and cannot recover.

Statement. At the conclusion of the evidence, and while the jury were still in the box, the defendant asked the trial court to charge the jury to find a verdict for defendant, by its special charge No. 1, which was as follows: "Gentlemen of the Jury: You are instructed in this case to return a verdict for the defendant." (Pr. Tr. p. 57). The trial court refused this peremptory charge, and endorsed upon the same the following language: "Refused. But the court is in doubt as to the correctness of its ruling. (Signed) T. S. Maxey, Judge." (Pr. Tr. p. 57). As shown by the bill of exceptions, this peremptory charge was asked upon the grounds now urged in this court; and to the court's refusal of the charge, the defendant excepted in the trial court. (Pr. Tr. pp. 57-58).

See statement under 1st assignment of error, pp. 6 to 19, of this brief.

FOURTH SPECIFICATION OR ASSIGNMENT OF ERROR

The U. S. Circuit Court of Appeals erred in affirming the judgment of the U. S. Circuit Court, and in refusing to sustain the second assignment of error of plaintiff in error, which was as follows: "The trial court erred in refusing to charge the jury to find a verdict for defendant, as requested in its special charge No. 1, as the evidence showed by a great preponderance, and conclusively, that the plaintiff attempted to mount the water car mentioned in the evidence and in his petition, in an

unnecessarily dangerous way, and in an unusually dangerous way; and if injured at all, he was injured through a risk assumed by him in not using the appliances required by law which defendant had provided for his use."

Proposition. A servant cannot recover of the master for injuries resulting from the use of appliances for a purpose for which they are not intended by the master, and for which it is not necessary that they should be used, however defective the appliances may be and in undertaking to use an appliance for a purpose for which it is not intended by the master, the servant takes upon himself the risks incident to such use.

Statement. See statement under the first assignment of error, pages 6 to 19, this brief; also under third assignment of error, page 27, this brief.

Argument under our 3rd and 4th Assignments of Error

It has been frequently held by the United States Courts that where the facts are undisputed or the preponderance is so great that the evidence practically becomes conclusive and no reasonable men ought to differ as to the deductions to be drawn from it, then the trial court can direct a verdict. (See Southern Pacific Co. vs. Pool, 160 U. S. 438 and cases cited).

It seems to us that the main question in this case is this: Where it is shown that a railroad company has provided safe and proper appliances for an employe's use in order that he may do his work, can he ignore the appliances provided for his use and go on and do the work in his own reckless, heedless way and still recover damages in case he sustains an injury in consequence?

We think it apparent to anyone, without any direct testimony about the matter, that the hand rail at the southwest cor-

ner of this water car No. 522, being more than seven feet from the ground, as shown by the direct testimony, was never intended for the purpose of enabling employes to mount the car or ride the same. Mr. Brown, who testified that the car was made under his supervision, and who describes its construction in detail, says, as we have shown, that the "hand rail was put along the side of the car to keep a man from falling as he goes from one end of the car to the other," and that "it is not designed for any other purpose." (Pr. Tr. p. 49). Mr. Cornelius testified that he had had 21 years of experience and that that rail was not put there to get on the car with. (Pr. Tr. p. 53). Mr. Carne testified that he had had 20 years' experience in the train service and that he did not recollect of ever seeing a hand rail on a water car such as that mentioned in the evidence low enough to reach from the ground. (Pr. Tr. p. 52). Vizard himself testified that the ground at the place where the accident happened was about level with the ties. (Pr. Tr. p. 33). And he testified that he was five feet 5 3-4 inches high. According to the uncontradicted testimony of C. A. Brown, it was 83 inches from the top of the rail to the hand rail. This court may know, or will know from actual observation or experiment that a man 5 feet 5 3-4 inches high, could not possibly reach the hand rail even if it were seven feet from the ground, without making a considerable jump to do so. He would have to jump several inches into the air to catch the rail. A man 5 feet 5 3-4 inches high even if he were using only one hand on a strain could only reach with the palm of his hand about six feet and six inches. Vizard himself testified as follows: "At the time of the accident as the water car passed me, I attempted to jump, or did jump and attempted to catch the hand railing. I made a jump at it and the rail pulled out."

As we have shown in the statement of the evidence, under our first assignment of error, almost every witness, whether for plaintiff or defendant, testified that the hand holds and stirrup are put on the front right hand corner of the car for the use of an employe or brakeman in getting on the car. As was said by R. P. Moore, the plaintiff's own witness on cross-examination, "that is what they are put there for, and that is why the law requires them to be put there," and it may be here remarked that not a single witness testifies to the contrary about this matter.

As we have shown, Mr. Dick, one of the inspectors at Douglas, who did some repairs about the car the afternoon before the alleged accident, and who inspected it and who saw it the morning after the accident, testified positively that the car was equipped with hand holds, grab irons and a stirrup at the front right hand corner. (Pr. Tr. pp. 44-45; also p. 47). W. J. Spalding testified that he was an inspector at Douglas, was familiar with the car, and that he knew that the car was equipped with stirrups on the corners diagonally opposite from each other, and that it had grab irons, and hand holds as indicated in the photographs during the month of February, 1904. (Pr. Tr. pp. 47-48).

C. A. Brown, under whose supervision and direction the car was made, testified positively that it was equipped with hand holds, grab irons and stirrups. (Pr. Tr. p. 49).

E. L. McAfee, the engineer who was operating the engine on the day of the alleged accident, testified that the car was equipped with hand holds, grab irons and a stirrup at the front right hand corner. (Pr. Tr. pp. 50-51). The only scintilla of evidence against this positive and direct testimony was the statement of the plaintiff Vizard on this trial to the effect that the car was not equipped with hand holds, grab irons and stir-

rup; but it was shown by the stenographic report of the evidence, which was admitted to be correct, that the plaintiff Vizard on the trial of this case in the District Court of El Paso County, Texas, at the October term, 1904, being shown a picture of the car, stated under oath that he got on the car at the southwest corner; that he did not know whether there was a stirrup at the other end or not; that there was none where he got on. (Pr. Tr. p. 43). It was further shown that in plaintiff's original petition filed in the State Court, on April 13, 1904, and that in his original petition filed in the U. S. Circuit Court at El Paso, on March 18, 1904, and that in his first amended original petition filed in the U. S. Circuit Court on April 9, 1904, and in all the pleadings filed by him up to the time he filed his first amended original petition in January, 1905, in the State Court "there is no allegation or intimation to the effect that the water car was not properly equipped with hand holds, grab irons and stirrups." (Pr. Tr. p. 55). But it may be said that the witness R. S. Claye testified on this trial that the car was not equipped with stirrups, hand holds and grab irons. But it was shown that this witness Claye was a comrade, companion and "pal" of the plaintiff Vizard; that he had testified on the former trial of the case in the District Court in the fall of 1904; that he had several times lately before this trial in the U. S. Circuit Court "discussed with counsel for plaintiff the necessity of saying that the car had no hand holds and no grab irons and had discussed the necessity of saying that it did not have a stirrup." (Pr. Tr. p. 40). It was shown by the stenographic report of the evidence of the trial in the State Court which was admitted to be correct, that this witness Claye had testified that there was a hand hold on the car and grab irons in handling cars to grab on; that the grab iron or hand hold

was fastened to the post; that there were steps or a stirrup to step on hung below the car; that there was one on each side of the car; that the stirrup with reference to the place where the rod was bent down at the west end was on the other end; that he knew there was one on that side on the other end from the place where the rod was bent down. (Pr. Tr. p. 44).

Counsel for plaintiff below, upon the trial, asked a special charge which was given by the trial court, in which special charge the fact was recognized as an established fact that there was a stirrup and hand hold on the standard at the front end of the car. (Pr. Tr. p. 62).

We respectfully submit that the judgment of the U. S. Circuit Court of Appeals and of the U. S. Circuit Court should be reversed and the cause remanded.

MILLARD PATTERSON,

Attorney for the El Paso & Southwestern Railway Co.,

Plaintiff in Error.

IN THE

Supreme Court of the United States

No. 245

EL PASO & SOUTHWESTERN RAILROAD CO.,
Plaintiff in Error,
vs.
H. D. VIZARD, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

The defendant adopts the statement of the nature and result of the suit as set out by plaintiff in error in its brief, and says that the same is substantially correct. At a former day of this term defendant filed his motion to dismiss this writ of error, alleging in said motion that the judgment of the Circuit Court of Appeals was a final judgment. We insist that said

motion should be granted, but in the event same is denied we submit the following in answer to brief of plaintiff in error filed in this court.

The first and second assignments of error are substantially the same and will be treated together. It is the contention of plaintiff in error that defendant in error was guilty of contributory negligence, as matter of law, and should not recover.

Our contention is, that under the facts and circumstances, he was guilty of no negligence, which proximately contributed to cause his accident, and the court correctly charged the jury on all issues raised, and it would have been error on the part of the court to have given the two special charges complained of, for the reason:

1st: Because the burden of proof was on the defendant to show that the plaintiff was guilty of contributory negligence; and

2nd: Because under the evidence it was not only a question of fact for the jury to say whether or not plaintiff was guilty of contributory negligence, but also whether same was the proximate cause of the accident.

3rd: Because under the evidence the question whether or not the water car was equipped with a stirrup, hand hold or grab iron was conflicting, and this therefore was a question of fact to be decided by the jury.

4th: Conceding that the car did have the appliances claimed, it not appearing that plaintiff was violating any rule, and the proof being almost undisputed that he was mounting the car in the usual and customary manner and way in which all train men should mount a car, under like circumstances, it then became a question of fact for the jury to decide whether plaintiff was in the exercise of due care, and whether the prox-

imate cause of the accident was due to defendant's negligence or plaintiff's contributory negligence.

STATEMENT.

Plaintiff testified that as the car came by he reached up, caught the hand rail and put one foot on the journal box or the truck of the car, and as his weight got to the hand railing it gave way. (R. 34).

"The usual and customary way of brakemen getting on this car at the time of the accident was to put their foot on the journal box and reach up and catch this hand rail. *I had no trouble in catching the hand rail at all.* The ground there at the time was about level with the ties. The iron rod, which run through the wooden upright standards, was three-fourths of an inch in diameter. *The car had nothing at all on it except this hand rail around the car.* At the time I took hold of the iron rail I had no knowledge of there being any defect in the same." (R. 33-34).

"I caught hold of the iron hand rail at the southwest corner of the car, and the hand rail pulled out of the standard and I fell and struck my spine on the cross-ties of the temporary water tank. *I had no trouble in reaching the hand rail.*" (R. 34-35).

"The end of the iron rail was about two feet from the end of the car. I caught the iron rail 2½ feet from the end of the iron rod, that is from the end of the upright standard." (R. 36).

R. A. Eubank testified:

"I examined this car a few minutes after the accident, and found the hand rail pulled loose from the standard. It was bent and sticking down near the ground. Mr. Grubb and my

self got the hand rail back and placed it behind the post. I examined the hand rail carefully at this time, and found that there was no nut on the end of the hand rail and that this hand rail was pulled out from the standard. This hand rail was placed and maintained on the water car for the use of the employees. The hand rail is used to keep a man from falling and also to be used by brakemen and other employees as a hand rail *in climbing on and off the car.*"

"The tap or nut in the end of this hand rail was gone. I discovered the defects in this hand rail in making examination while the car was in Douglas early that morning, also by examining the same a few moments after plaintiff was hurt. I am positive this is the car from which he fell, as I found him lying very near the car, and also, discovered the hand rail bent out of its regular position. I then examined the hand rail and found the nut on the end which held the hand rail in the standard was gone. The end of the hand rail at the time I examined it was rusty." (R. 38).

Mr. Claye testified that he examined the car next morning after the accident and found the hand rail out of the socket and no nut on it and the end rusty; that the same was used by an employee as a grab iron to get on and off the car; that it was customary for all employees to put one foot on the journal box and take hold of the hand rail to ride the cars; *that this car had no stirrup or grab iron on the standard or on the end of the car.* (R. 39).

Mr. Dick, a witness for defendant, testified that he was employed as a car inspector at Douglas. "I have seen a great many switchmen and brakemen get on the side of these cars and catch hold of the hand rail when switching." (R. 46).

"If he got his foot on the oil or journal box and his hand

hold on the iron rod, and did not slip off the oil box there would be no danger in riding the car in this manner." (R. 47).

Mr. Spaulding, a witness for the defendant, testified:

"It is a frequent occurrence for switchmen and brakemen in the yards at Douglas to catch hold of the hand rail and put their foot on the journal or oil box, and ride the cars out through the yards. I have seen them do it in Douglas. They do it quite a good deal." (R. 48).

"It is true that a brakeman quite frequently catches anything that he gets hold of. I have seen them let the front end of the car go by and catch the rear end." (R. 48).

Mr. McAfee for defendant testified:

"I am not willing to swear positive that all the appliance shown in the picture were on the car February 22nd." (R. 51).

Mr. Carruthers, witness for defendant, testified:

"The stirrup and hand rail are put at the corner for the purpose of enabling brakemen *to get on top of the car.* That is what I mean. (R. 51). I have seen brakemen catch the hand rail of the water car, such as the one mentioned in evidence, at the rear end of the car, and put their foot on the journal or oil box and ride the car out. I have done it myself. *The stirrup is put there for brakemen to climb on top of the car; on top, yes, that is what I mean.* If a man wants to ride out to the switch, he can instead of getting on top of the car, take hold of the hand holds and hang on the side of the car. I have seen brakemen in switching hold on to the side of the car, holding to the hand hold. I have done it myself. I do not know as there is any particular danger about it than any other way. The jour-

nal box is usually lower than the stirrup. You will be straightened out more if you put your foot on the oil box and hold to the hand rail than you would if you used the hand holds on the standard and stirrup. I suppose it is just as easy to take hold of the hand rail and put your foot on the oil box as the other way. I have seen a great many others do it. I have done it myself. If he got hold of the hand rail I could not see any particular danger, if he got a good hold." (R. 52).

Mr. Carne, witness for defendant, testified:

"*When I speak of using the stirrup I am talking of getting on top of the car.* If a man should get a good hold it is just as safe to catch hold of the hand rail and put your foot on the oil box. If the brakeman could reach the hand rail conveniently I would not consider it dangerous to take hold of the hand rail and put your foot on the journal; to ride as shown me by the stirrup and hand hold on the standard you would be in a jack knife position." (R. 52).

Mr. Cornelius, witness for defendant, testified:

"Brakemen often reach up and take hold of the hand rail and put their foot on the journal box or oil box and hang there to ride out. They do it a great deal. I myself have done it. Brakemen often reach up and take hold of the hand rail and put their foot on the oil box; it is done a great deal; done frequently; I have done it; no particular danger. A car like that if you take hold of the hand rail on the standard and put your foot in the stirrup you would be in a cramped position." (R. 53).

Mr. Hoy, witness for defendant, testified:

"If a brakeman can reach the railing and get his foot on the oil box, I do not know as he is in any danger. I have rode in that manner and have seen thousands of other men ride in

it. They do it every day. It is done on all railroads in the United States that I have worked for." (R. 54).

Mr. Rowe, witness for defendant, testified:

"If the iron rail was low enough so a man could reach up and catch it, and put his foot on the oil box, I don't know that there would be any particular danger. I have seen them put their foot on the oil box and reach up and catch this hand rail on the water cars. I have seen them do it instead of putting their foot in the stirrup. If they got a good hold I do not see the danger of it in taking hold of this rail and putting the foot on the oil box and riding only four or five miles an hour." (R. 55).

Mr. Atherton, a switchman of twenty years' experience, testified:

"If a car was being pulled east by an engine, the brakeman being on the right hand or engineer's side of the train, if he desired to mount the water car by the hand rail would usually and customarily catch the hand rail and put his foot on the truck or oil box, and ride the car out. If he did not want to get on top of the car he would catch hold of the hand rail and put his foot on the oil box or journal and ride out. I never saw a water car with a hand hold on the standard at the right hand corner. *The step is put there to get on the car when you wish to mount on top of the car.*" (R. 55-56).

Mr. Glenn, one of defendant's employees, testified:

"I don't believe I ever saw a water car on the El Paso & Southwestern with a hand hold on the standard as shown on the photograph introduced in evidence. The customary way of mounting a water car such as the one mentioned in evidence, by a brakeman on the engineer's side of the train, as the car is

being pulled east would be to catch the hand rail and put his foot on the oil or journal box." (R. 56).

Mr. Foth, one of defendant's employees, testified:

"I am familiar with the manner and way in which brakemen and conductors and switchmen do their work in riding cars out. If a water car such as mentioned in the evidence, was being pulled in an easterly direction, the brakeman being on the right hand or engineer's side of the train, would usually and customarily, if he desired to mount the car and ride the same out, catch the hand rail and put his foot on the truck or box of the journal." (R. 56).

AUTHORITIES AND REMARKS.

The court left the question of defendant's negligence and plaintiff's contributory negligence to the jury, and no exception was reserved by defendant to the general charge.

In Ry. Co. vs. Cox, 145 U. S., 593, 36 Law. Ed., 833, the court said:

"The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."

In Jones vs. Ry. 128 U. S., 443, 32d Law Ed., 478, plaintiff met with his accident by being struck by a train at the depot, and Justice Miller, in reversing the case said:

"So long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, there is no reason why it should not decide said question."

In Dunlap vs. Ry. Co. 139 U. S., 649, Chief Justice Fuller, in reversing the case said:

"The court erred in not submitting the question of con-

tributory negligence to the jury, as the conclusion did not follow as matter of law that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."

In the Tolson Admr. case, 139 U. S., 551, 35th Law Ed., 270, Justice Gray said:

"The burden of proof is upon defendant to show contributory negligence of plaintiff, and that contributory negligence of the plaintiff will not excuse defendant, if it be shown that defendant might by the exercise of reasonable care and prudence have avoided the consequence of plaintiff's negligence."

In other words the burden of proof is on the defendant to not only show that plaintiff was guilty of some act of negligence, but that such act was the proximate cause of the injury and that it could not by the exercise of ordinary care have avoided the consequence of plaintiff's negligence.

In Ry. Co. vs. Adams, 94 Texas, 106, Justice Brown said:

"If, however, under the facts of the particular case there might be a phase in which the servant would be justified or excused in disregarding the rule of the company, then it becomes a question for the jury to determine whether such act is negligence, that is, whether under all the circumstances a reasonably prudent person would have done as the plaintiff in the case did, citing Dunlap vs. Ry. supra, and other Texas authorities."

In Balhoff vs. Ry. 65 N. W., 593, it is held:

"Whether or not a brakeman was guilty of contributory negligence in riding on a flat car between two tiers of logs to make a coupling, whereby he was injured by being caught between the logs, is a question for the jury, on the conflicting evidence, as to the prudence of such an act."

In Donahu vs. Ry. 176 Mass., 251, the court said:

"If the evidence is conflicting as to the question whether the place chosen was a proper one, the servant's contributory negligence is for the jury."

The court, at the request of the plaintiff, gave the following special charge:

"At the request of the plaintiff you are further instructed that if you should find and believe from the evidence before you in this case that the plaintiff attempted to mount the rear of said water car by the use of the hand rail and by placing his foot on the journal box or oil box, instead of mounting the front end of the car by the use of the stirrup and hand hold on the standard, and you should further find that in so doing he was in the exercise of due care for his own safety and was doing his work and mounting the car in the usual and customary manner and way in which brakemen usually and customarily mount such cars, and that in mounting said car in the manner and way in which he did attempt to mount same, at the time of said accident, he was not guilty of negligence, as that term has been defined to you in the main charge, then you are instructed that he would not be guilty of contributory negligence." (R. 62). No exception was reserved to this special charge. (R. p. 65).

All the evidence strongly tended to show that plaintiff in mounting the car did so in the usual and customary manner and way practiced by all its employees. It was also shown by a majority of the witnesses that this car had no grab iron or stirrup, *and each of the witnesses admitted that this stirrup was not used for any purpose other than to mount the car*, that if a brakeman attempted to hang on by the use of the stirrup *he would be doubled up in a cramped and jack knife position.*

Under the head of contributory negligence, 29 Amer.-Eng. Ency. of Law, p. 418, we find the following:

"Where the plaintiff's injury was caused by an act on his part which the law regards as negligence *per se*, he cannot excuse his contributory negligence by proof of the custom on the part of others to do the same act in the same way. *But where an act is not negligence per se, the plaintiff, to rebut a charge of contributory negligence, may introduce evidence of general custom among persons experienced in the performance of the same act, under similar circumstances to perform it as he did.*"

In each of the following cases the above proposition is fully sustained.

Choctaw Ry. Co. vs. Tenn., 191 U. S. 328; 48 L. Ed. 202.

Ry. vs. Waller et al, 65 S. W. 212.

Ry. Co. vs. Beam, 50 S. W., 411.

Ry. Co. vs. Puente et als, 70 S. W., 362.

Ry. Co. vs. Clark (Ky.), 55 S. W., 699.

Ry. Co. vs. Zink (Pa.), 17 Atl., 614.

Ry. Co. vs. Milliken (Ky.), 51 S. W., 796.

Martin vs. Ry. Co. (Ky.), 26 S. W., 801.

Ry. Co. vs. Hobbs (Ind.), 29 N. E., 934.

Ry. Co. vs. Ice Co., 49 App. Div. 485; 63 N. Y. Supp. 535.

Curtis vs. Ry. Co. (Wis.), 70 N. W., 665.

Refley vs. Ry. Co. (Minn.), 75 N. W., 704.

Ry. Co. vs. Engleham, 62 S. W., 561.

Flanders vs. Ry. Co., 53 N. W., 544.

Jeffrey vs. Ry., 56 Iowa, 546.

Whitsett vs. Ry., 67 Iowa, 150.

Waters vs. Moss, 12 Cal., 535.

Prosser vs. Ry., 17 Mont., 372.

Keating vs. N. Y. C., 49 N. Y., 673.

Nelson vs. Ry., 18 Utah, 244.

In the case of Ry. Co. vs. Tennessee, 191 U. S., 328 (48 L.

Ed. 202), a brakeman attempted to mount the pilot of a moving engine and was injured. It was the contention of the railway that he was guilty of contributory negligence as matter of law, but plaintiff's contention was that he was acting in a proper and customary manner of head brakeman under the circumstances. The court in affirming the case said: "Taking all the evidence, we are of the opinion that there was enough evidence to demand its submission to the jury, and if by that body found to be true, it was enough upon which to found a verdict for the plaintiff."

In the Weller case, 65 S. W., 212, writ of error denied by our Supreme Court, the court said: "Upon the issue of contributory negligence it was proper to show that deceased was pursuing the usual and customary method in doing the work when injured," citing the Beam case.

It is said in Miller vs. Ry., 89 Iowa, 567, "Plaintiff introduced a witness, to testify that it was usual and customary for brakemen in going over the tender to step on the lip of the manhole. We do not understand counsel to object to this line of evidence. It was usual and proper for plaintiff to show that he was in the line of his duty when he received the injury and that he pursued the course usually adopted by men in that employment under similar circumstances."

In Lochart vs. Ry., 40 Fed., 632, the court said:

"Was there ever a more hopeless case against a railroad company? I think not. The contributory negligence insisted on and always the company lays hold of any circumstance that may be at hand to suggest that defense—was that the intestate did not ride on that part of the foot board at the rear of the engine where he might have escaped. So he would have escaped if by some fictitious circumstance he had not been on the engine

at all, or if he had been engaged in practicing law and never had been a switchman at all. Always on this plan of constructing contributory negligence for a bulwark of defense the unfortunate victim should have been in that place shown by the circumstances to have been a safe place."

In the case at bar, if the plaintiff had attempted to use the stirrup and had gotten in a cramped or jack knife position, as the evidence showed he would have gotten into by the use of the stirrup, and had met with an accident, then the railroad company would have "cried," he should have gotten in an upright position, hold of the hand rail, with his foot on the oil box, which would have been the safe way to ride the car out.

Conceding for the purpose of argument that the water car did have stirrup, grab iron and hand hold on the standard, what was the proximate cause of the accident? But one answer can be made. Failure of the defendant to have a nut on the end of the hand rail. It being shown that it was the customary practice for all of defendant's employees, as well as the employees of all railroads, to mount a water car as plaintiff did, it then became purely a question of fact for the jury to say as was said by our Supreme Court in the Adams case, 94 Tex., 106:

"Whether or not under all the circumstances a reasonably prudent person would have done as the plaintiff in the case did." And as was said by Judge Shelby in the Prunty case, 133 Fed., 20: "He was violating no rule of the railroad company but on the contrary was pursuing the course usual with those engaged in its service."

Defendant on the trial recognized the above rule of law as being correct, and drew its 12th special charge with that rule of law in mind. (R. Sp. Ch. No. 12, p. 65).

It was not error on the part of the court to refuse plaintiff in error's special charge No. 3.

1st. Because the question of whether or not the car was equipped at the right hand corner with grab irons, hand hold and stirrup was one of the issues raised by defendant on the issue of contributory negligence. And as the burden of proof was not on plaintiff, but on the defendant, to show that plaintiff was guilty of contributory negligence in mounting the car at the place and in the manner and way in which he did, said special charge therefore was erroneous and misleading and was properly refused; and

2nd. Because all the questions properly raised by said special charge No. 3, were fully covered by the general charge of the court.

Each of the above questions were questions of fact for the jury, and as said special charge entirely ignored such of said questions, the same was erroneous, misleading and properly refused.

It was not error on the part of the court to refuse plaintiff in error's special charge No. 7, because said special charge was misleading and not authorized by the evidence, in that said special charge ignored the question of whether or not plaintiff in mounting the car did so in the usual and customary manner and was acting as a reasonably prudent person would have acted and performed said duty under like circumstances.

No proof was introduced showing that plaintiff was violating any rule or statute, and was therefore not guilty of negligence *per se.*

It was therefore a question of fact for the jury whether he was acting as a reasonably prudent person would have acted under like circumstances.

As was said by Judge Shelby in the Prunty case, 133 Fed., 20:

"There are two essential elements in contributory negligence—a want of ordinary care and a casual connection between the act and the injury complained of. The evidence tends to show that the act which is charged to be contributory negligence was not unusual, and was generally safe; *that he was violating no rule of the railroad company but on the contrary was pursuing the course usual with others engaged in its service.* But if the plaintiff's act was one showing a want of ordinary care, before it could be deemed contributory negligence to defeat his action it must appear to be a proximate cause of the injury; that is, there must be a casual connection between the act and the injury."

It was proper for the court to refuse plaintiff in error's 5th and 6th special charges for the reason that each was on the weight of the evidence, misleading and calculated to confuse the minds of the jury, besides the court in its general charge instructed the jury fully on the questions raised by said special charges. The court instructed the jury on this branch of the case as follows:

"And you are further instructed that if the car inspectors of the defendant used reasonable care at proper intervals to inspect the hand railing and make all such repairs as was necessary in connection therewith at such proper intervals, the intervals to be determined by you from a consideration of all the testimony, then, the defendant would not be liable to the plaintiff for any injury which he may have received; although in point of fact there was no nut on the railing at the time he was hurt, if indeed you find that he was hurt in attempting to catch hold of the hand railing. If, however, you conclude from

a consideration of the testimony that the hand railing was defective, then you will determine whether the defendant through its agents and servants could have ascertained the defective condition of the same by the exercise of reasonable care and diligence."

We think that by reason of the failure of plaintiff in error to except to the giving of defendant in error's special charge No. One, that it is here precluded from raising or insisting upon any of the above assignments of error for the reason that the failure to except to said special charge, under the rules and practice of the Federal court, said special charge, even erroneous, became the settled law of the case and no exception thereafter could be made, claiming that the same was not the law applicable to the facts.

We respectfully submit that no error has been shown and ask that the case be in all things affirmed.

Respectfully submitted,

GEO. E. WALLACE,

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